IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 515

In the Matter

of

LYTTLETON B. P. GOULD,

Bankrupt.

JOSEPH K. SHERMAN, Trustee, Estate of Lyttleton B. P. Gould, Bankrupt,

Petitioner,

against

WILLIAM E. BUCKLEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

PAGE

Petition for Writ of Certiorari:

Caption 1

Statement of the Matter Involved 2

Basis of Jurisdiction 5

Questions Presented 5

Statute Involved 7

Reasons for Granting the Writ 8

Prayer for Writ 14

Brief in Support of Petition:

Opinions Below 15

Jurisdiction 15

The Facts 16

Specifications of Error 16

Argument 18

I The decision of the Circuit Court of Appeals for the Second Circuit in the instant case conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. 2d 428 20

II The decision of the Circuit Court of Appeals for the Second Circuit on an important question of local law conflicts with applicable local decisions of the State courts of New York .. 24

III The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court 30

PAGE

IV The Circuit Court of Appeals for the Second Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court 33

A. Conflict with decisions in *Gross* v. *Irving Trust Co.* and *Taylor* v. *Sternberg* 33

B. Conflict with decision in *Isaacs* v. *Hobbs Tie & Timber Co.* 36

V The Circuit Court of Appeals for the Second Circuit decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority 39

A. The bankruptcy court has exclusive jurisdiction over the proceeds of the cause of action owned by bankrupt herein 40

B. The statutory power of the State court under Section 475 of the Judiciary Laws of New York must yield to the exclusive jurisdiction of the bankruptcy court 45

C. A bankruptcy court will protect its exclusive jurisdiction by injunction 48

D. The consent of a bankruptcy court that another court may determine questions affecting property under its jurisdiction must be clear and affirmative, and its jurisdiction may not be affected by unauthorized action of its officers 49

E. A void order is subject to collateral attack which may be by injunction to restrain prosecution of void order 53

Conclusion 54

Table of Cases Cited.

	PAGE
Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 56 L. Ed. 208, 32 S. Ct. 96, 27 A. B. R. 262	40
Atchison, T. & S. F. R. Co. v. Wells, 265 U. S. 101, 68 L. Ed. 928, 44 S. Ct. 469	54
Ex Parte Baldwin, 291 U. S. 610, 78 L. Ed. 1020, 54 S. Ct. 551	48, 50
Beeler v. Schumacher, (C. C. A. 6), 80 F. 2d 715	43
Matter of Board of Water Supply, 179 App. Div. 877	9, 25
Burnham v. Brush, 26 N. Y. Supp. 2d 397	9, 25, 28
Butzel v. Webster Apartments Co., (C. C. A. 6), 112 F. 2d 362	56
Matter of City of New York, 219 N. Y. 192	9, 25, 55
Chicago, R. I. & P. Ry. Co. v. City of Owatonna, 120 F. 2d 226	46, 53
Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. R. Co., 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595	48, 54
Corcoran v. Kellogg Structural Co., 179 App. Div. 396	9, 25
Crowley v. Wolf, 281 N. Y. 59, 22 N. E. 2d 234	9, 24
In re Cusinamo's Will, 22 N. Y. S. 2d 677, 174 Misc. 1068	9, 25
Degen v. Steinbrink, 188 App. Div. 622, 625	9, 25
Matter of Dunn, 205 N. Y. 398	9, 25
Fischer-Hansen v. Brooklyn Heights R. R. Co., 173 N. Y. 492, 500	43
Fish v. East, (C. C. A. 10), 114 F. 2d 177	43
Forcey v. Silberblatt, (C. C. A. 3), 78 F. 2d 1016	55
Freeland v. Williams, 131 U. S. 405, 33 L. Ed. 193, 9 S. Ct. 763	54

PAGE

Gamble v. Daniel, (C. C. A. 8), 39 F. 2d 447, Cert. den. 282 U. S. 848, 75 L. Ed. 752 43

Greenberg v. Remick & Co., 230 N. Y. 70, 129 N. E. 211 .....9, 24, 55

Gross v. Bush Terminal Co., (C. C. A. 2), 105 F. 2d 930 56

Gross v. Irving Trust Co., 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 342 .....12, 30, 33, 35, 40, 46, 50

Grover and Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 34 L. E. 670, 11 S. Ct. 92 54

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270....12, 30, 31, 36, 38, 40, 43, 44, 48, 50, 53, 55

Jeny v. Merkle, 128 App. Div. 833 .....9, 25, 29

Johnson v. Collier, 222 U. S. 538, 56 L. Ed. 306, 32 S. Ct. 104 49

Johnson v. Ravitch, 113 App. Div. 810 ..... 9, 25

Kalb v. Feuerstein, 308 U. S. 433, 84 L. Ed. 370, 60 S. Ct. 343 .....13, 39, 45, 54

Kessler v. Herklotz, 132 App. Div. 278, 117 N. Y. S. 45, 22 Am. B. R. 257 ..... 11, 49

Matter of Krooks, 257 N. Y. 329, 178 N. E. 548 ..9, 25, 55

Long & Alstatter Co. v. Willis, 3 N. E. 2d 910, 52 Ohio App. 299 42

Lynn v. Agnew, 179 App. Div. 305, 309 ..... 9, 25

In re Marsters (C. C. A. 7), 101 F. 2d 365, Cert. denied 306 U. S. 663, 59 S. Ct. 788, 83 L. Ed. 1059 41

Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917 F. 402 .....9, 25, 26, 55

Martucci, *et al.* v. Brooklyn Children's Aid Society, *et al.*, 284 N. Y. 408, 31 N. E. 2d 506 55

McDaniel National Bank v. Bridwell (C. C. A. 8), 65 F. 2d 428 .....8, 18, 20, 22, 23, 42, 46, 51

PAGE

Mueller v. Nugent, 184 U. S. 1, 14, 46 L. Ed. 405, 22 S. Ct. 269 41
Northeastern R. E. Sec. Corp. v. Goldstein, 276 N. Y. 64, 11 N. E. 2d 354 44
In re No. 32 East 67th Street, 96 F. 2d 795 46
In re Paschal, 10 Wall. (77 U. S.) 483 ..... 29, 47
In Re Prudence Co. (C. C. A. 2), 96 F. 2d 157 ..11, 32, 49
Riehle v. Margolies, 279 U. S. 218, 73 L. Ed. 669, 672, 673 42
Roake v. Palmer, 119 App. Div. 64 ..... 9, 25
Rosser v. Rosser, 42 N. M. 360, 78 P. 2d 1110, 1112 42
In re Schermerhorn (C. C. A. 8), 145 F. 341 ..... 43, 53
Straton v. New, 283 U. S. 318, 320, 75 L. Ed. 1060, 51 S. Ct. 465 55
Taylor v. Sternberg, 293 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260 .....12, 30, 33, 35, 40, 44, 46, 54
Matter of Tillman, 259 N. Y. 133, 181 N. E. 75 ....9, 25, 55
United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055, 32 S. Ct. 620 ... 50
Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. Ed. 379, 28 S. Ct. 182 40
In re Weston (C. C. A. 2), 68 F. 2d 913 ..... 41, 51
Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 25 S. Ct. 778 ..... 43, 53
In re Worrall (C. C. A. 2), 79 F. 2d 88 41

Texts Cited.

1 Am. Jur., Actions, Sec. 44 42
31 Am. Jur., Judgments, Sec. 597 54
31 Am. Jur., Judgments, Sec. 622, 623 54
Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 11, Page 1177 49

PAGE

Collier on Bankruptcy 14th Ed., Vol. 2, Sec. 23, Page 471 41
Collier on Bankruptcy, 14th Ed., Vol. 2, Sec. 23, Page 473 41
1 C. J. S., Actions, Sec. 1 (f (5) and (6)) 42
Remington on Bankruptcy, 4th Ed., Vol. 5, Sec. 2365, Page 542 41

Statutes Cited.

Bankruptcy Act, Sec. 2 (15) (11 U. S. C. A., Sec. 11) 54
Constitution of the United States, Article 1, Sec. 8, Clause 4 54
Judicial Code, Sec. 240 as amended, (28 U. S. C. A. Sec. 347) 5, 15
Judicial Code, Sec. 262 (28 U. S. C. A., Sec. 377) .. 54
Judiciary Law of New York, Sec. 475 ....7, 12, 19, 45, 46

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In the Matter of LYTTLETON B. P. GOULD, Bankrupt. JOSEPH K. SHERMAN, Trustee, Estate of Lyttleton B. P. Gould, Bankrupt, Petitioner, against WILLIAM E. BUCKLEY, *et al.*, Respondents.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, JOSEPH K. SHERMAN, as Trustee in Bankruptcy of the Estate of Lyttleton B. P. Gould, Bankrupt, respectfully prays this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a final judgment of that Court entered on the 23rd day of May, 1941, reversing a decree and order of the District Court of the United States for the Southern District of New York, entered on the 20th day of December, 1940, enjoining respondents from taking any steps in an action in the State Courts of New York to enforce an attorney's lien for services and disbursements.

Statement of the Matter Involved.

Petitioner is, and since the 26th day of January, 1934, has been the duly acting and qualified Trustee of the Estate of Lyttleton B. P. Gould, Bankrupt, in proceedings pending in the District Court of the United States for the District of Connecticut (R. fol. 56).

In 1927, Gould, not then bankrupt, sued one William S. Murray and one Henry Flood, Jr., co-partners, in the Supreme Court of New York in an action for damages due to the claimed interference by the defendants with a promotion contract, and for commissions due from the defendants in the promotion, beginning in 1923, of hydro-electric projects, known as the Santee-Cooper Development and the Saluda River Development in South Carolina (fols. 20, 21, 26, 27).

In connection with said action, said Gould retained the respondents, Buckley & Buckley, as his attorneys under an agreement that they should serve for a contingent fee of 50% of any net recovery (fols. 70, 71).

The case came to trial on November 7, 1932 (fol. 36), and at the conclusion of the plaintiff's case, the Court directed a nonsuit (fol. 80). Gould appealed; and the appeal was pending at the time of Gould's adjudication in bankruptcy on January 11, 1934, in the District Court of the United States for the District of Connecticut (fols. 125, 126).

Petitioner Sherman, Trustee of Gould, with the consent of the Referee in Bankruptcy in charge of said matter, permitted the bankrupt to continue to prosecute the action in his own name with the understanding that the avails thereof would inure to the benefit of the bankrupt's estate (fol. 27).

On January 9, 1935, the record on appeal not yet having been perfected or filed (fol. 126), Gould, with the con-

sent of petitioner (fols. 44 to 47), having decided to engage new attorneys, moved in the Supreme Court of New York for the substitution of Davies, Auerbach & Cornell, which firm subsequently became Davies, Auerbach, Cornell & Hardy, as his attorneys in said action (fols. 69 to 75).

Subsequently, on January 16, 1935, the respondents herein filed a petition for determination of the amount of their attorneys' lien (fols. 94 to 105).

In connection with the petition of respondents for determination of said lien, respondents advised said Supreme Court of New York that Gould had theretofore been adjudicated bankrupt and that a trustee had been appointed of his estate (fols. 100, 101).

No notice was ever given to the trustee of such application for determination of attorneys' lien, and he was given no opportunity to be heard on such matter (fols. 53, 81), although notice of same was given to Davies, Auerbach, Cornell & Hardy, the attorneys for Gould in said action.

Thereafter, on February 25, 1935, Mr. Justice McGoldrick made and entered an order in said Supreme Court of New York substituting Davies, Auerbach & Cornell as attorneys for the plaintiff in said action, and further awarding to the respondents a lien of 30% upon any monies recovered in said action, together with a lien for disbursements necessarily made, which disbursements should be determined by a referee (fols. 58 to 63).

After substitution, Davies, Auerbach, Cornell & Hardy perfected the appeal, and the Appellate Division reversed the judgment and order a new trial (fol. 30).

The second trial of the action was begun on October 8, 1940 (fol. 82), Davies, Auerbach, Cornell & Hardy appearing for the plaintiff, and on October 14, 1940, the case was settled by a judgment being entered, on stipula-

lation, for breach of contract, in the sum of $40,000.00, without interest and without costs (fol. 204).

Execution was stayed upon the following terms: $10,000 to be paid within ten days after the entry of said judgment, and $5,000 every three months thereafter until the full amount was paid (fols. 204 and 205).

Thereupon, the respondents moved in the Supreme Court of New York for an order directing said Murray & Flood to pay to them 30% of the amount agreed upon, together with their expenses, as a condition of receiving satisfaction of the judgment which was to be entered (fols. 160 and 161).

Petitioner, in ancillary proceedings, applied to the United States District Court for the Southern District of New York for an order enjoining respondents from proceeding with said motion on the ground that the Supreme Court of New York had no jurisdiction over the recovery, because the right of action was an asset in bankruptcy and subject to the paramount and exclusive jurisdiction of the bankruptcy court, and that therefore the order determining the attorneys' lien was void (fols. 19 to 33).

On October 23, 1940, a temporary injunction and an order to show cause why a permanent injunction should not be issued was made by Hon. Vincent L. Leibell, District Judge (fols. 15 to 18), and, after hearing, an opinion was handed down by Hon. John W. Clancy, District Judge, granting said motion for an injunction (fols. 211 to 213).

On December 20, 1940, in accordance with said opinion, an order was duly entered by the United States District Court for the Southern District of New York enjoining and restraining respondents from proceeding or taking any further proceedings to collect upon or to assert their attorneys' lien, except in the bankruptcy proceedings of Lyttleton B. P. Gould (fols. 10 to 14).

On appeal, the Circuit Court reversed the order of the District Court and denied the motion for an injunction (fol. 220, *et seq.*), the opinion of the Circuit Court being reported in 119 F. 2d. 280.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, by Act of January 31, 1928, c. 14, sec. 1, 45 Stat. 54, and by Act of June 7, 1934, c. 426, 48 Stat. 926 (28 U. S. C. A. Section 347).

The judgment of the Circuit Court of Appeals for the Second Circuit sought to be reviewed was entered on May 23, 1941.

Questions Presented.

I.

Whether a State court or any court other than the bankruptcy court may determine the amount, or validity, of an attorney's lien against a chose in action, upon substitution of new attorneys in the suit upon such chose in action, where such chose in action was for money damages for breach of contract and tortious interference with a contract and therefore the action was one *in personam*, when during the pendency of such action and prior to such substitution and determination of the attorney's lien, the plaintiff was adjudicated a bankrupt and such suit was continued in the name of the bankrupt, although the judge of the State court was advised of the adjudication in bankruptcy and the appointment of a trustee of bankrupt's estate?

II.

Whether a State court or any court other than the bankruptcy court acquires jurisdiction over the proceeds of an action *in personam,* or acquires any jurisdiction other than the right to determine the issues in such action (*i. e.*, whether or not plaintiff is entitled to damages from the defendants, and if he is, the amount of such damages), so that where the plaintiff was adjudicated a bankrupt prior to a settlement of or judgment in such action, it had the power and authority to determine the amount or validity of claims or liens against the proceeds of a subsequent settlement or judgment despite the exclusive jurisdiction of the bankruptcy court over the property of the bankrupt?

III.

Whether a trustee in bankruptcy, in allowing to be continued a pending action *in personam* in a State court in the name of the bankrupt, with the consent of the bankruptcy court, thereby submitted himself to the jurisdiction of the State court so that such court had the power to determine the amount or validity of an attorney's lien upon any possible proceeds of such action?

IV.

Whether the mere permission of a bankruptcy court to allow an action *in personam* to be prosecuted in a State court is a consent by the bankruptcy court that such State court may determine the validity or amount of liens or claims against the proceeds of such action *in personam?*

V.

The bankruptcy court's exclusive jurisdiction over the property of a bankrupt having attached, may control of the administration of the estate be surrendered even by that court itself?

VI.

Whether a State statute, giving authority to the courts of such State to determine attorneys' or other liens in actions *in personam* pending before such courts, must give way to the paramount and exclusive jurisdiction given to the bankruptcy courts by Congress under authority of the Constitution?

VII.

Whether a litigant has the absolute right to discharge his attorney and be represented by counsel of his own selection, or whether, as held by the Circuit Court below, "he could not insist that new attorneys should represent him in that court without its consent"?

Statute Involved.

Section 475 of the Judiciary Law of New York, which provides as follows:

> "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment, or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

Reasons for Granting the Writ.

I.

The decision of the Circuit Court of Appeals for the Second Circuit in the instant case that the pendency of the action, which was one *in personam*, gave the State court authority to determine the amount of the lien of the displaced attorneys to any proceeds of such action, despite the adjudication as bankrupt of the plaintiff prior to the commencement of proceedings for determination of such lien, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *McDaniel National Bank* v. *Bridwell*, 65 F. 2d 428, wherein it was held that where a trustee in bankruptcy brought a plenary suit in equity in the district court against a person and a bank to recover money on deposit in the bank which he claimed was created by money of the bankrupt and was transferred to defraud creditors, and the equity court determined the issues in favor of the trustee, such equity court had no jurisdiction to determine any claim of the bank against the proceeds of such judgment even though they had been paid into the registry of the equity court, since the suit by the trustee was one *in personam*, that the equity court had obtained no jurisdiction over the deposit further than the jurisdiction to determine the question of ownership, and that such ownership having been determined, the bank must resort to the bankruptcy court for a determination of its claim, as under the law all of the assets of bankrupt were subject to the jurisdiction of the bankruptcy court, which jurisdiction was exclusive and could not be surrendered.

II.

The Circuit Court of Appeals for the Second Circuit in the instant case has decided an important question of

local law in a way probably in conflict with applicable local decisions in that said court decided that new attorneys could not be substituted in the State court action without the consent of that court, as against the universal decisions of the New York State courts that a client who employs an attorney has an absolute right to discharge the attorney and substitute new attorneys of his own selection. See *Crowley* v. *Wolf*, 281 N. Y. 59, 22 N. E. 2d 234; *Greenberg* v. *Remick & Co.*, 230 N. Y. 70, 129 N. E. 211; *Matter of Krooks*, 257 N. Y. 329, 178 N. E. 548; *Matter of Dunn*, 205 N. Y. 398; *Matter of Tillman*, 259 N. Y. 133, 181 N. E. 75; *Martin* v. *Camp*, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917 F. 402; *Matter of City of New York*, 219 N. Y. 192; *Burnham* v. *Brush*, 26 N. Y. Supp. 2d 397; *Degen* v. *Steinbrink*, 188 App. Div. 622, 625; *Lynn* v. *Agnew*, 179 App. Div. 305, 309; *Corcoran* v. *Kellogg Structural Co.*, 179 App. Div. 396; *Matter of Board of Water Supply (Bell)*, 179 App. Div. 877; *Jeny* v. *Merkle*, 128 App. Div. 833; *Roake* v. *Palmer*, 119 App. Div. 64; *Johnson* v. *Ravitch*, 113 App. Div. 810; *In re Cusinamo's Will*, 22 N. Y. S. 2d 677, 174 Misc. 1068.

III.

A. An important question of Federal law which has not been, but should be, settled by this Court is whether, where the bankruptcy court consents that the trustee prosecute an action *in personam* in the name of a bankrupt, such consent carries with it an implied consent that the court in which said action is pending may determine claims to or liens against the proceeds of such action. This is of the utmost importance as a guide to bankruptcy courts in the administration of estates so that the paramount and exclusive jurisdiction given to bankruptcy courts by Congress, under the Constitution, to administer estates in bankruptcy, including the power and jurisdic-

tion over all cases and controversies between the bankrupt and his creditors for the collection of assets and the ascertainment and liquidation of liens thereon, and for the marshaling and disposition of funds so as to secure the rights of all parties and to effect a due distribution among all creditors, shall not be inadvertently and unknowingly, or my implication, delegated to some other court.

B. The Circuit Court for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this court. Prior to this case, there has never been a decision on the exact question of whether a trustee, by bringing, intervening in or continuing in the name of the bankrupt a plenary suit *in personam* for money damages thereby submits himself to the jurisdiction of the court in which such suit is pending to the extent that such court may determine liens or claims, such as attorney's liens, against the proceeds of such suit. The questions involved herein are of the utmost importance in administering the bankruptcy law in the several States having statutory attorney's liens such as in New York, so that both the Federal courts and the State courts may be guided, in similar cases, in determining whether the validity and amounts of such liens must be adjudicated by the bankruptcy courts by virtue of their paramount and exclusive jurisdiction over all assets of a bankrupt in his actual or constructive possession at the time of the filing of the petition in bankruptcy, thus insuring the orderly administration of bankrupt's estates and the determination of all liens and claims against property of bankrupt in such bankruptcy court, or whether the court in which such plenary action *in personam* is pending may determine such liens or claims to the proceeds of such action.

C. The Circuit Court for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this court. Prior to this case, there has never been a decision by this court on the question as to whether a trustee, by allowing to be continued in the name of the bankrupt a plenary suit *in personam* for money damages, thereby submits himself to the jurisdiction of the court in which such suit is brought. The Circuit Court in the instant case held that he does thereby submit himself to the jurisdiction of such court, saying that in such circumstances "we deal with the case as though he had been openly the party plaintiff." This decision is contrary to dicta of the same Circuit Court in the case of *In Re Prudence Co.*, 96 F. 2d 157, where that court said, among other things, that a trustee may elect not to take over the prosecution but may allow the suit to be continued by the bankrupt and later claim the fruits of any recovery, and "by so doing they would be able to obtain the benefit of such judgment as the debtor might finally obtain without subjecting the estate to liability for past or future services of the attorney or for costs, in case the suit should fail." Circuit Court Judge Swan, in said case, cited as authority for such statement *Kessler v. Herklotz*, 132 App. Div. 278, 117 N. Y. S. 45, 22 Am. B. R. 257.

IV.

The Circuit Court, in the instant case, has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

A. The decision of the Circuit Court to the effect that the exclusive jurisdiction of the bankruptcy court was no bar to the power of the State court to determine the attorneys' lien in the suit *in personam* pending in said

court is in conflict with the decisions of this Court in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 342 and in *Taylor* v. *Sternberg*, 239 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260. In both of these cases, this Court held that the paramount and exclusive jurisdiction of the bankruptcy court precluded the State courts from fixing the compensation of their own receivers, the sole power to fix such compensation and fees having passed to the bankrutcy court. In other words, this Court determined that the statutory rights of the State courts to fix compensation and fees in receivership cases pending before them must give way to the paramount jurisdiction of the bankruptcy courts. Applying these decisions to the instant case, it appears that the statutory power of the State courts of New York to determine and enforce an attorney's lien upon the petition of the client or attorney, granted under Sec. 475 of the Judiciary Law of New York, must also give way to the paramount jurisdiction of the bankruptcy courts granted to them by Congress under the authority of the United States Constitution.

B. The decision of the Circuit Court to the effect that the prosecution of the suit *in personam* in the State court necessarily involved a consent to the exercise of that court's jurisdiction to liquidate the charging lien of the displaced attorneys is in conflict with the decision of this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645. In that case, this Court held that the paramount and exclusive jurisdiction of the bankruptcy court precluded any court other than a bankruptcy court from interfering with property subject to the exclusive jurisdiction of the bankruptcy court, save with the consent of the bankruptcy court; that the action of the trustee in removing the cause from the State court to the United States District Court was not a consent to the jurisdiction of said court, as the officers of a court of

bankruptcy have no power to oust the bankruptcy court of jurisdiction over property which has come into its possession.

V.

The Circuit Court, in the instant case, has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

The Circuit Court in the instant case decided that the statutory power of the State court, in New York, to determine attorneys' liens in actions pending before them, could not be abridged by the laws of Congress relating to bankruptcy, and that such State courts may determine attorneys' liens against choses in action which are property of bankrupt estates. This decision is in conflict with the decision of this Court in *Kalb* v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370, 60 S. Ct. 343, wherein this Court held that the States cannot, in the exercise of control over local laws and practice, vest their courts with power to violate the supreme law of the land; and that the Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, may exercise over the person and property of a bankrupt.

The Circuit Court in the instant case also decided, in effect, that the pendency of a suit *in personam* in a State court conferred jurisdiction on that court to determine liens against the proceeds of such suit, despite the fact that a court of superior jurisdiction had custody of the *res*, which was the chose in action, and that the prosecution of such a suit *in personam* was a consent to the determination by the State court of such lien against the proceeds. This is contrary to the overwhelming weight

of authority, which is to the effect that a suit *in personam* confers on a court no jurisdiction other than the jurisdiction to determine the issues presented by the pleadings, *i. e.*, whether or not plaintiff is entitled to money damages and the amount of such damages; that the bankruptcy court is a court of paramount or superior jurisdiction; that where a court of superior or paramount jurisdiction has custody of property, no other court may interfere with the jurisdiction of such court over the property, and that such court may protect its jurisdiction by injunction; that such jurisdiction may not be interfered with in any way, save with the actual consent of the court of superior jurisdiction; and that an officer of a court of paramount jurisdiction cannot affect the jurisdiction of such court, whether by waiver, estoppel or laches.

Prayer for Writ.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

Dated, Stamford, Connecticut, August 8, 1941.

JOSEPH K. SHERMAN, *as Trustee of Estate of Lyttleton B. P. Gould, Bankrupt, Petitioner.*

By SYDNEY C. PERELL,
Counsel for Petitioner.

IN THE

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

One opinion was delivered by the District Court. It was written by District Judge John W. Clancy and filed December 6, 1940. It appears on page 71 of the record. It was not reported.

The opinion of the Circuit Court of Appeals (Circuit Judges L. Hand, Swan and Augustus N. Hand, Judge L. Hand writing) was filed April 28, 1941, and is annexed to the certified transcript of the record filed herein. It is reported in 119 F. 2d 280.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, by Act of

January 31, 1928, c. 14, sec. 1, 45 Stat. 54, and by Act of June 7, 1934, c. 426, 48 Stat. 926 (28 U. S. C. A. sec. 347). The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 23, 1941. The petition was filed August 15, 1941.

The Facts.

The facts are stated in the petition, page 2. We emphasize that the suit pending in the State Court was one for money damages; that the only authority granted by the bankruptcy court in the premises was the consent of the Referee that petitioner permit the bankrupt to continue to prosecute the action in his own name, with the understanding that the avails thereof would inure to the benefit of his estate; that no notice was ever given to the trustee of the application for determination of the attorneys' lien; and that respondents knew of the bankruptcy proceedings and themselves advised the State Court of same.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In holding that by continuing the action *in personam* in the State court in the name of the bankrupt, the trustee submitted himself to the jurisdiction of the State court.

2. In holding that the consent of the bankruptcy court that the trustee permit the action to be continued in the State court in the name of the bankrupt, with the understanding that the avails thereof inure to the benefit of the

bankrupt estate, was a consent by the bankruptcy court that the State court could determine the validity and amount of the substituted attorneys' lien.

3. In not holding that the paramount and exclusive jurisdiction of the bankruptcy court was a bar to the determination by the State court of liens and claims against the proceeds of the plenary action *in personam* pending in the State court.

4. In not holding that the only jurisdiction of the State court was to determine the issues in the pending suit as to whether or not the plaintiff-bankrupt was entitled to damages from the defendants and the amount of such damages.

5. In not holding that a State statute giving authority to the courts of such State to determine attorneys' or other liens in actions *in personam* pending before such courts must give way to the paramount and exclusive jurisdiction given to the bankruptcy courts by Congress under authority of the Constitution.

6. In holding that unless the trustee desired to discontinue the action entirely, he must submit himself to the jurisdiction of the State court not only for a determination of the issues in the case, but also for the determination of liens against the proceeds of such case.

7. In not holding that the jurisdiction of the bankruptcy court having attached, control of the administration of the estate could not be surrendered even by that court itself.

8. In not holding that the consent by a bankruptcy court to have the interests of third persons in property

of the bankrupt adjudicated in a State court must be by actual and direct consent and not by implication from consent to try some other issue in a State court.

9. In holding that the permission of the bankruptcy court to allow the plenary action *in personam* to be prosecuted in the State court necessarily involved a consent to such incidents as the determination of the lien of displaced attorneys against the proceeds of such action.

10. In holding that the bankrupt, with the approval of the trustee, could not insist that new attorneys should represent him in the State court without the consent of such court.

11. In not holding that a litigant has the absolute right to discharge his attorney and be represented by counsel of his own selection.

Argument.

I. The decision of the Circuit Court of Appeals for the Second Circuit in the instant case conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. 2d 428.

II. The decision of the Circuit Court of Appeals for the Second Circuit on an important question of local law of New York State conflicts with applicable local decisions of the State courts of New York.

III. The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

IV. The Circuit Court of Appeals for the Second Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

V. The Circuit Court of Appeals for the Second Circuit decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

A. The bankruptcy court has exclusive jurisdiction over the proceeds of the cause of action owned by bankrupt herein.

B. The statutory power of the State court under Sec. 475 of the Judiciary Laws of New York must yield to the exclusive jurisdiction of the bankruptcy court.

C. A bankruptcy court will protect its exclusive jurisdiction by injunction.

D. The consent of a bankruptcy court that another court may determine questions affecting property in its jurisdiction must be clear and affirmative, and its jurisdiction may not be affected by unauthorized action of its officers.

E. A void order is subject to collateral attack, which may be by injunction to restrain prosecution of void order.

I.

The decision of the Circuit Court of Appeals for the Second Circuit in the instant case conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. 2d 428.

A comparison of the facts in the instant case with those in *McDaniel National Bank* v. *Bridwell, supra,* clearly shows that there is a conflict in the decision of the two circuits. The material facts are as follows:

The instant case	*McDaniel case*
1. Jan. 1934 – Gould adjudicated bankrupt and petitioner appointed trustee in bankruptcy.	1. 1927 – John H. Case adjudicated bankrupt and appellee appointed trustee in bankruptcy.
2. Trustee continued, in name of bankrupt, pending suit in State courts of New York against Murray & Flood for money damages for breach of contract and tortious interference with contract.	2. Trustee brought a plenary suit in equity in District Court against a Mrs. Winslow and appellant bank to recover asset of bankrupt, which consisted of deposit of $6,361.60 in appellant bank, deposited in name of Mrs. Winslow, and which trustee claimed belonged to bankrupt and had been transferred to her in fraud of creditors; and on October 17, 1930, judgment was entered for plaintiff trustee decreeing that defendants pay to trustee the amount of the deposit less certain items.

2a. Jan. 9, 1935 – Bankrupt moved in Supreme Court, New York County, for an order substituting Davies, Auerbach & Cornell as his attorneys in place of respondents.

3. Jan. 16, 1935 – Respondents applied to Supreme Court, New York County, to fix the sum to be paid to them as a condition to substitution.

3. Dec. 2, 1930 – Appellant bank filed a bill in equity in the same court alleging that bankrupt was indebted to bank in the sum of more than $4000. which it was entitled to offset against the deposit, and praying that it might deduct this indebtedness from the amount it was required to pay to trustee.

4. Feb. 25, 1935 – Supreme Court made an order directing substitution and awarding a lien of 30% of any moneys recovered to respondents.

4. July 1, 1931 – Court stayed execution of decree and ordered bank to pay into its registry the amount of the deposit to abide the further order of the court.

4a. Oct. 15, 1940 – Suit settled by entry of judgment against defendants for breach of contract in the amount of $40,000.00.

5. Dec. 20, 1940 – Order of Supreme Court determining lien declared void and order made by United States District Court, Southern District of New York, restraining respondents from proceeding or taking any further proceedings in Supreme Court, New York County, in interference with property of estate of bankrupt and from taking any further steps to collect except in the bankruptcy proceeding.	5. Sept. 1931 – Court dismissed suit on ground that bankruptcy court had exclusive jurisdiction over the deposit as property of the bankrupt.
6. 1941 – On appeal to Circuit Court of Appeals, the decree was reversed.	6. 1933 – On appeal to Circuit Court of Appeals, the decree was affirmed.

The facts in both cases give rise to exactly the same question of law, namely, the jurisdiction of a court over the proceeds of a suit *in personam* where bankruptcy intervenes. In the *McDaniel National Bank* case, however, the position of the appellant was much stronger than the position of respondents in the instant case, for the reason that in the *McDaniel* case the trustee himself brought an action in his own name as trustee in the Equity Court, and further the amount of the deposit in the bank was actually paid into the registry of the Equity Court, while in the instant case the suit was continued in the name of the bankrupt and the State court never had any control whatsoever over the proceeds.

In the *McDaniel* case, the court held that while a court of equity has inherent power to prevent its process from

doing injustice to anyone, and that this power may be invoked in a proper case by an ancillary or independent bill, still the court never had possession of any property or any fund and the deposit did not in any way confer jurisdiction upon the Equity Court; that the Equity Court had obtained no jurisdiction over the deposit further than the jurisdiction to determine the question of ownership; that under the law all of the assets were under the control and subject to the exclusive jurisdiction of the bankruptcy court, which could not be surrendered, and that a final determination of the title to the deposit ended the case so far as the jurisdiction of the court of equity was concerned; that thereafter jurisdiction to determine controversies with respect to this asset of the bankrupt's estate was exclusively in the court of bankruptcy, and that the claim of the bank could only be determined by the court of bankruptcy.

So, in the instant case the sole jurisdiction of the State court was the right to determine whether or not Murray & Flood were indebted to the bankrupt in accordance with the allegations of the complaint, and, if so, the amount of such indebtedness. The adjudication in bankruptcy divested the State court of any statutory right it may have had to determine, upon application, the amount of the substituted attorneys' lien, as the assets of the bankrupt, including the chose in action in suit, became subject to the exclusive jurisdiction of the bankruptcy court under authority of the Constitution. As was stated in the *McDaniel* case, the only reason that the trustee in the instant case resorted to continuance of the action in the State court against Murray & Flood, was that the court of bankruptcy was without jurisdiction to adjudicate in a summary proceeding the controversy with Murray & Flood with reference to the claim for damages, and the submission of this question to the State court was in no way a surrender of the jurisdiction of the bankruptcy

court to determine claims against the proceeds of such suit. The Circuit Court in the instant case, however, decided that such action was a surrender of such jurisdiction to the Supreme Court of New York, and it is respectfully submitted that there is, therefore, a conflict between the decisions of the Circuit Courts for the Second and Eighth Circuits.

II.

The decision of the Circuit Court of Appeals for the Second Circuit on an important question of local law conflicts with applicable local decisions of the State courts of New York.

The Circuit Court decided, in the instant case, that the trustee (actually the bankrupt) could not insist that new attorneys should represent him in the State court of New York without that court's consent, upon which consent it might impose such conditions as it saw fit.

This is of importance in the instant case as it might be possible (although this is not conceded, Point V *infra*), if substitution of attorneys in New York was a matter of discretion with the court rather than a matter of absolute right, that the court could impose certain conditions upon the substitution, and if the trustee, or the bankrupt, wished to avail himself of the benefits of the discretionary order, he must do so subject to the conditions imposed.

The decision of the Circuit Court on this important question, however, conflicts with the applicable decisions of the State courts of New York. These courts have universally held that a client who employs an attorney has an absolute right to discharge the attorney and substitute new attorneys of his own selection.

> *Crowley* v. *Wolf*, 281 N. Y. 59, 22 N. E. 2d 234;
> *Greenberg* v. *Remick & Co.*, 230 N. Y. 70, 129 N. E. 211;

Matter of Krooks, 257 N. Y. 329, 178 N. E. 548;
Matter of Dunn, 205 N. Y. 398;
Matter of Tillman, 259 N. Y. 133, 181 N. E. 75;
Martin v. *Camp*, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917 F. 402;
Matter of City of New York, 219 N. Y. 192;
Burnham v. *Brush*, 26 N. Y. Supp. 2d 397;
Degen v. *Steinbrink*, 188 App. Div. 622, 625;
Lynn v. *Agnew*, 179 App. Div. 305, 309;
Corcoran v. *Kellogg Structural Co.*, 179 App. Div. 396;
Matter of Board of Water Supply, 179 App. Div. 877;
Jeny v. *Merkle*, 128 App. Div. 833;
Roake v. *Palmer*, 119 App. Div. 64;
Johnson v. *Ravitch*, 113 App. Div. 810;
In re Cusinamo's Will, 22 N. Y. S. 2d 677, 174 Misc. 1068.

The leading case in New York on the subject is *Matter of Dunn, supra*, where the court said, at page 401:

> "That the relationship between attorney and client is one of an unusual character has been so often affirmed that a statement of the proposition is commonplace. There lie at its foundation the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney which render the relationship a personal and confidential one and make its obligations on the part of the attorney of the most exacting kind. This conception of it is evidenced by the facts amongst others that the statute in the case of witnesses compels the observance by the attorney of the confidences which have been intrusted to him and that the courts by virtue of their inherent power over attorneys

compel by summary and rigorous proceedings their fulfillment of obligations springing out of the relationship, while they leave to ordinary processes the enforcement of contractual obligations undertaken by one who is an attorney when they lie outside of such relationship. (*Matter of Niagara, L. & O. Power Co.*, 203 N. Y. 493, 496.)

"It is apparent that a relationship so personal and confidential may be more easily disturbed than a less sensitive one, and that its effectiveness may be so impaired by any change which destroys the confidence of the client or which required the unwilling transfer by the attorney of his allegiance in a given matter to a substituted client as to make it desirable to permit a termination of the relation rather than to attempt to coerce its continuance under adverse conditions. This policy of permitting its dissolution in a manner which would not prevail in the case of ordinary contracts has been upheld in various cases.

"It is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney. If the latter has not been guilty of any tangible violation of the relation, this substitution must be made on conditions which are fair to him. (*Tenney* v. *Berger*, 93 N. Y. 524, 529; *Matter of Prospect Avenue*, 85 Hun 257; *Matter of Paschal*, 77 U. S. 483, 496.)"

The rule is also well stated in *Martin* v. *Camp, supra*, where the court stated at page 173 of 219 N. Y.:

"Notwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make, the peculiar relation of trust and confidence that such a relationship implies in-

jects into the contract certain special and unique features. In *Marsh* v. *Holbrook* (3 Abb. Ct. App. Dec. 176) the question whether an attorney could recover upon a *quantum meruit* merely or might recover in an action for damages for breach of contract was discussed. Two members of the court who participated in the decision of that case were of the opinion that the attorney was entitled to recover the whole contract price. The question was not, however, determined, Judge WOODRUFF pointing out that the question was not necessarily before the court as the attorney had not appealed from the judgment. Since the decision of that case the nature of the contract existing between attorney and client has been the subject of frequent discussion. (*Matter of Dunn*, 205 N. Y. 398 and cases cited: *Andrewes* v. *Haas*, 214 N. Y. 255, 259.) These cases and many others that might appropriately be cited to the same effect establish that while so far as the attorney is concerned the contract is entire and the attorney cannot recover unless he completely performs, the client with or without cause may terminate the contract at any time. The substance of the rule declared in these cases was expressed by Judge HISCOCK in *Matter of Dunn* (*supra*). In that case it was said: 'It is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney.' (p. 402).

"That the client may at any time for any reason or without any reason discharge his attorney is a firmly-established rule which springs from the personal and confidential nature of the relation which such a contract of employment calls into existence. (*Matter of Dunn*, 205 N. Y. 398.) If the client has the right to terminate the relationship of attorney

and client at any time without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract. If in such a case the client can be compelled to pay damages to his attorney for the breach of the contract, the contract under which a client employs an attorney would not differ from the ordinary contract of employment. In such a case the attorney may recover the reasonable value of the services which he has rendered but he cannot recover for damages for the breach of contract. The discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause.''

The right of a litigant to counsel of his own selection is secured to him by constitutional and statutory provisions. This was discussed by Justice EDER in *Burnham* v. *Brush, supra,* who stated, at page 399:

> ''* * * this right of a litigant to a counsel of his own selection is generally secured to him by constitutional or statutory provisions, both in civil and criminal cases (Amend. VI, U. S. Const.; Art. I, Section 6, New York State Const.; Section 236, Civil Practice Act; *People* v. *Price,* 262 N. Y. 410, 187 N. Ed. 298; *People* v. *Hull,* 251 App. Div. 40, 296 N. Y. S. 216; *Kerling* v. *G. W. Van Dusen & Co.,* 109 Minn. 481, 124 N. W. 235, 236, 372; *In re Mandell,* 2 Cir., 69 F. 2d 830), and while this right is not a natural right but a creature of positive law, the extent to which it may be impinged is, I think, a matter open to debate. In the *Price* case (262 N. Y. 410,

187 N. Ed. 299), the court said: 'Under both our Federal and State Constitutions, a defendant has the right to defend in person or by counsel of his own choosing. * * * Where, therefore, a (person) appears by his own attorney, there is no power in the court to assign counsel at any stage of the proceedings.' While that principle was enunciated in a criminal case and dealt with constitutional provisions, Section 236, Civil Practice Act, is indicative of the same thought. And *In re Mandell, supra* (69 F. 2d 831), the court reversed an order imposing an attorney on a trustee in bankruptcy who was not one of his own choice, saying, '* * * in general we regard it as inimical to good administration to fasten an attorney on the trustee against his will.' "

In *Jeny* v. *Merkle, supra*, the County Court denied a motion by a litigant for substitution of attorneys. On appeal to the Appellate Division, that court reversed the lower court, saying, at page 834:

> "This is an appeal from an order denying a motion made by the plaintiff for a substitution of attorneys. The client has the right without assigning cause to change his attorney, and the only question before the court on this motion was whether the order should be made unconditionally or conditionally upon the plaintiff's paying or securing payment of attorney's fees. (*Matter of Prospect Avenue*, 85 Hun, 257; *Barkley* v. *N. Y. C. & H. R. R. Co.*, 35 App. Div. 167.)"

The same rule was enunciated by the United States Supreme Court in the case of *In re Paschal*, 10 Wall. (77 U. S.) 483, where this Court held that a party has a general right to change his attorney, as "the relations

between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interest must necessarily suffer."

The decision of the Circuit Court on this particular question was therefore clearly in conflict with the decisions of the State courts of New York, and it is apparent that the Circuit Court based its decision upon the erroneous view that a client may not insist that new attorneys should represent him in a court without the consent of that court, upon which it might impose such conditions as it sees fit.

III.

The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

While it is submitted that the decisions of this Court in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 342; *Taylor* v. *Sternberg*, 293 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260, and *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270, are applicable to the issues in the instant case, and that the decision of the Circuit Court below was contrary to these decisions (See Point IV, *infra*), this Court has never decided the questions raised herein on facts exactly like those in the instant case.

There is no question but that bankruptcy courts have exclusive jurisdiction over all property of bankrupts in their actual or constructive possession at the time of the filing of the petition in bankruptcy; and that this exclusive jurisdiction carries with it the sole power to ascertain the validity and amount of existing liens, and to decree the method of their liquidation The jurisdic-

tion in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors.

Issacs v. *Hobbs Tie & Timber Co., supra.*

The issues in the instant case raise several questions which are of the utmost importance, so that bankruptcy courts and their officers may know just what acts of theirs would constitute a consent that some other court determine questions which otherwise would rest solely in the jurisdiction of the bankruptcy court.

These questions are as follows:

1. Where a bankruptcy court consents that the trustee prosecute an action *in personam* in the name of a bankrupt, does such consent carry with it an implied consent that the court in which such action is pending may determine claims to or liens against the proceeds of such action?

2. Where a trustee institutes, intervenes in, or continues in the name of a bankrupt, a plenary suit *in personam* for money damages, does the trustee thereby submit himself to the jurisdiction of the court in which such suit is instituted or is pending to the extent that such court may determine liens or claims, such as attorneys' liens, against the proceeds of such suit?

3. Where a trustee, with the consent of the bankruptcy court, allows to be continued in the name of the bankrupt a plenary suit *in personam,* with the understanding that the fruits of such suit shall inure to the benefit of the bankrupt's estate, does he thereby submit himself to the jurisdiction of the court in which such suit is pending so that he is liable for costs, or attorneys' fees, etc.?

As to questions 1 and 2, the decision of the Circuit Court holding that the consent to the prosecution of the action was a consent to the determination of the lien and a submission by the trustee to the jurisdiction of the State court is contrary to the purpose of the bankruptcy laws giving exclusive jurisdiction to the bankruptcy courts and the motivating force which caused the framers of the Constitution to give Congress the power to enact uniform laws on the subject of bankruptcy throughout the United States. This motivating force was the desire to insure the orderly administration of an estate in bankruptcy in a single court, including the power and jurisdiction over all cases and controversies between the bankrupt and his creditors for the collection of assets and the ascertainment and liquidation of liens thereon, and for the marshaling and disposition of funds so as to secure the rights of all parties and to effect a due distribution among all creditors.

It is of the utmost importance that this court determine these questions so that the exclusive jurisdiction of the bankruptcy court shall not be inadvertently and unknowingly, or by implication, delegated to some other court.

As to the third question, the decision of the Circuit Court that the continuation of an action by a trustee in the name of a bankrupt, or the permission of a trustee that a bankrupt continue an action *in personam*, with the understanding that the fruits of the litigation shall inure to the benefit of the estate in bankruptcy, is a submission to the jurisdiction of the court in which such action is pending, is contrary to *dicta* of the same Circuit Court in *In re Prudence Co.*, 96 F. 2d 157, where said court said that a trustee may allow the suit to be continued by the bankrupt and later claim the fruits of any recovery, and by so doing would be able to obtain the benefit of such judgment as bankrupt might finally obtain without sub-

jecting the estate to liability for attorneys' services or for costs in case the suit should fail.

This important question as to the liability of a trustee in circumstances such as these has never been decided by this Court, and should be decided by this Court so that the bankruptcy courts and their officers may be advised as to their liability in such circumstances and may therefore guide themselves accordingly.

The questions discussed herein are also discussed under Point V hereof as they arise in connection with the argument thereunder.

IV.

The Circuit Court of Appeals for the Second Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

A. The decision herein is in conflict with the decisions of the Supreme Court in *Gross* v. *Irving Trust Co., supra,* and *Taylor* v. *Sternberg, supra.*

A comparison of the facts in the instant case with those in *Gross* v. *Irving Trust Co.* and *Taylor* v. *Sternberg,* will show that the rulings of law established in those two cases are applicable to the instant case, and that the conclusions of the Circuit Court are in conflict with the decisions of this Court. The material facts in these cases, as compared to the facts in the instant case, are as follows:

The instant case	*Gross* v. *Irving Trust Co.* & *Taylor* v. *Sternberg*
1. Suit for damages instituted in Supreme Court, New York County, against Murray & Flood.	1. Receivership proceedings instituted in State courts.

2. Plaintiff adjudicated bankrupt, and trustee appointed.	2. Defendants adjudicated bankrupts and trustees appointed.
3. After application for substitution of attorneys in State court action, respondents applied for order fixing value of their attorneys' lien in accordance with the provisions of Section 475 of the Judiciary Law of New York giving the court the power, upon the petition of the client or attorney, to determine such lien.	3. Prior to turning over to the trustees in bankruptcy the assets of bankrupts, the receivers and their counsel applied to their respective State courts for determination and allowance of their fees in accordance with the provisions of the statutes in the respective States giving their courts the power to determine and make allowances to receivers and attorneys in proceedings in such courts.
4. The State court determined the amount of the attorneys' lien of respondents and awarded a lien of 30% upon any moneys recovered in the action together with a lien for disbursements necessarily made, and appointed Philip J. Sinnott referee to hear testimony with respect to the amount of disbursements necessarily incurred.	4. The State courts made various allowances to the receivers and attorneys.

5. The bankruptcy court, in ancillary proceedings brought for the purpose in the Southern District of New York, enjoined respondents from taking any further steps to collect upon their asserted attorneys' lien except in the bankruptcy proceeding of Lyttleton B. P. Gould.	5. The bankruptcy courts, in summary proceedings, directed the receivers and attorneys to turn over to the trustees in bankruptcy the amounts awarded to them by the State courts and remitted them to the bankruptcy courts for proceedings with respect to their claims for allowances.
6. On appeal to the Circuit Court of Appeals, the decree of the District Court was reversed.	6. On appeals to the Circuit Courts of Appeals, the decrees of the District Courts were affirmed.
7. Petitioner now prays for a Writ of Certiorari to the Circuit Court of Appeals.	7. On Writs of Certiorari to the Circuit Courts of Appeals, the decrees of said courts were affirmed.

The decisions of this Court in *Gross* v. *Irving Trust Co.* and *Taylor* v. *Sternberg*, in the light of these facts, are clearly applicable to the instant case. The State statute giving the court the right to determine the attorneys' lien is no more sancrosanct than the statutes authorizing the State courts to make allowances in receivership cases. And, as this Court held in the two cases under discussion, with the filing of the petition in bankruptcy, the power of the State courts under these statutes ceased and the orders of the State courts were nullities, the jurisdiction of the bankruptcy court being paramount and exclusive.

It is submitted, therefore, that so, in the instant case, did the power of the New York court to determine the attorneys' lien cease, the chose in action having passed into the possession of the bankruptcy court and the jurisdiction of the bankruptcy court being paramount and exclusive. The State statutes must give way to the paramount federal laws enacted under authority of the Constitution. And so, in the instant case, the decision of the Circuit Court was in conflict with applicable decisions of this Court.

B. The decision herein is in conflict with the decision of this Court in *Isaacs* v. *Hobbs Tie & Timber Co., supra.*

A comparison of the actions of the trustees in the instant case and in the *Isaacs* case shows them to be analogous, and that the principles of law enunciated by this Court in the *Isaacs* case are applicable to the instant case. The facts, in sequence, in the two cases are as follows:

The instant case	*Isaacs case*
1. L. B. P. Gould adjudicated bankrupt and Joseph K. Sherman appointed trustee in proceedings in Connecticut.	1. Henrietta E. Cunningham adjudicated bankrupt and B. K. Isaacs appointed trustee in proceedings in Texas.
2. Trustee permitted continuation of pending suit in State court of New York by bankrupt with understanding that the avails of the suit would inure to the benefit of bankrupt's estate.	2. Hobbs Tie & Timber Co. commenced foreclosure action of mortgage in a State court of Arkansas to foreclose on certain property of bankrupt.

3. Bankrupt, with approval of trustee, moved to substitute new counsel in said suit in the State court.	3. Trustee and bankrupt appeared specially in the State court proceeding, and then petitioned for removal of the cause to the United States District Court for the Western District of Arkansas, and there filed an answer alleging no jurisdiction, as the bankruptcy court had exclusive jurisdiction and had not consented to the foreclosure.
4. Upon application of respondents, the State court fixed their attorneys' lien at 30% of any recovery, plus disbursements.	4. The District Court struck out so much of the answer of the trustee as sought to delay judgment and sale, and entered, on the pleadings, a decree of foreclosure and sale.

In the *Isaacs* case, on Certificate from the Circuit Court, and on Writ of Certiorari to the District Court, this Court held that the paramount and exclusive jurisdiction of the bankruptcy court having attached to the property in question, no other court could interfere; that while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount, and to decree the method of their liquidation; that the removal of the cause by the trustee from the State court to the Federal court was not a waiver or estoppel as to the jurisdictional question, nor

a submission to the jurisdiction of the Federal court in the foreclosure proceeding, as it is beyond the power of the bankruptcy court's officers to oust it of jurisdiction.

So, in the instant case, the continuation of the action for money damages could not oust the bankruptcy court of its exclusive jurisdiction to determine the validity and amount of the attorneys' lien against the proceeds of the suit for money damages, no permission having been given by the bankruptcy court to the State court to make such determination.

It is significant to note that this Court stated that the trustee in the *Isaacs* case might have instituted ancillary proceedings in the District Court for the Western District of Arkansas and there obtained an injunction to restrain the Hobbs Tie & Timber Co. from foreclosing its mortgage. This was exactly the procedure followed in the instant case where the trustee instituted ancillary proceedings in the District Court for the Southern District of New York and there obtained an injunction restraining respondents from attempting to collect on the lien awarded and remitting respondents to the bankruptcy court for a determination of their lien.

The judgment of the Circuit Court reversing the decree of the District Court, and holding that the trustee, by continuing the action in manner aforesaid, submitted himself to the jurisdiction of the State court and waived the exclusive jurisdiction of the bankruptcy court, was clearly in conflict with the applicable decision of this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*

V.

The Circuit Court of Appeals for the Second Circuit decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

It is submitted that the decision of the Circuit Court herein is in conflict with the applicable decision of this Court in *Kalb* v. *Feuerstein*, 308 U. S. 433. Before discussing this conflict, however, it will be well to discuss the questions of general law involved, so that the law, as set forth in *Kalb* v. *Feuerstein*, may be taken up in its proper place after being demonstrated as applicable herein.

The Circuit Court in the instant case decided, in effect, that the pendency of a suit *in personam* in a State court conferred jurisdiction on that court to determine liens against the proceeds of such suit, despite the fact that a court of superior jurisdiction had custody of the *res*, which in the instant case was the chose in action in suit, and that the prosecution of such a suit *in personam* was a consent to the determination by the State court of such lien against the proceeds.

In order to adequately discuss this reason for the granting of the petition for Certiorari herein, it is necessary to go into the merits of the case. Before doing so, however, it will be well to state that the principles of law discussed hereinafter with relation to the jurisdiction of the bankruptcy courts are really general rules of law laid down with respect to the power of any court of competent jurisdiction. This is because the principle, that when the jurisdiction of a bankruptcy court has attached to property, the court's possession cannot be affected by

proceedings in any other court and its jurisdiction is exclusive, is but an application of the well-recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession.

> *Isaacs* v. *Hobbs Tie & Timber Co., supra;*
> *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38; 52 L. Ed. 379; 28 S. Ct. 182.

It is seen, therefore, that the matters discussed hereinafter, while pertaining to the bankruptcy court and its officers in the instant case, are questions of general law.

A. The bankruptcy court has exclusive jurisdiction over the proceeds of the cause of action owned by bankrupt herein.

Upon the adjudication in bankruptcy of Lyttleton B. P. Gould, on January 11, 1934, title to all property in his possession at the time of the filing of his petition in bankruptcy vested in his trustee.

> *Isaacs* v. *Hobbs Tie & Timber Co., supra;*
> *Gross* v. *Irving Trust Co., supra;*
> *Taylor* v. *Sternberg, supra.*

The possession conferring exclusive jurisdiction in the bankruptcy courts need not be actual, but may be constructive, as in the case of choses in action.

> *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, 32 S. Ct. 96, 27 A. B. R. 262;

Mueller v. *Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, 22 S. Ct. 269;
Collier on Bankruptcy, 14th Edition, Vol. 2, Sec. 23, Page 471;
Remington on Bankruptcy, 4th Edition, Vol. 5, Sec. 2365, Page 542.

The claim for money damages for breach of contract and for wrongful interference with a contract in the instant case is such a chose in action, whose constructive possession gives the bankruptcy court exclusive jurisdiction.

In re Weston (C. C. A. 2), 68 F. 2d 913.

See also Collier on Bankruptcy, 14th Ed., Vol. 2, Sec. 23, Page 473, where the rule is stated, as follows:

> "Where the intangible consists of a chose in action, such as a debt owed the bankrupt or a contract claim, such intangible may be said to be in the constructive possession of the bankruptcy court so as to enable the court summarily to determine the rights of various claimants to the chose in action, if the bankrupt remained the legal owner up to the time of the filing of the petition."

So, in the instant case, the claim for money damages, in suit in the State courts of New York, not having been assigned by the bankrupt, was in his constructive possession at the time of the filing of his petition and became subject to the exclusive jurisdiction of the bankruptcy court.

In re Marsters (C. C. A. 7), 101 F. 2d 365, Cert. denied 306 U. S. 663, 59 S. Ct. 788, 83 L. Ed. 1059;
In re Worrall (C. C. A. 2), 79 F. 2d 88.

Nor does the fact that the claim of bankrupt was in suit and that such suit was pending in the State courts alter the situation in any way. Bankrupt was still the sole owner of the chose in action and had done nothing to alienate his title to or possession of same. Although the bankruptcy of Gould did not divest the Supreme Court of New York of jurisdiction of the pending action, it divested that court of jurisdiction to deal with the avails of the action, since the chose in action and the proceeds of same were property of the bankrupt's estate. The pending suit was one *in personam*, since it was an action for money damages for breach of contract and wrongful interference with a contract.

Riehle v. *Margolies*, 279 U. S. 218, 73 L. Ed. 669, 672, 673;
Rosser v. *Rosser*, 42 N. M. 360, 78 P. 2d 1110, 1112;
1 Am. Jur., Actions, Sec. 44;
1 C. J. S., Actions, Sec. 1 (f [5] and [6]).

And an action *in personam* gives the court before which it is pending no jurisdiction over any *res*; it merely gives such court jurisdiction to determine the issues raised by the pleadings, *i. e.*, in the instant case, whether or not bankrupt was entitled to damages from Murray & Flood, and if so, the amount of such damages.

McDaniel National Bank v. *Bridwell* (C. C. A. 8), *supra*;
Long & Alstatter Co. v. *Willis*, 3 N. E. 2d 910, 52 Ohio App. 299, appeal dismissed, 2 N. E. 2d 60, 131 Ohio St. 287.

Neither did the lien of respondents give them any rights as adverse claimants so that they might object

to the jurisdiction of the bankruptcy court, nor did the lien convert the State court proceeding to one *in rem*. In *Fischer-Hansen* v. *Brooklyn Heights R. R. Co.*, 173 N. Y. 492, the court stated, at page 500:

> "A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it."

See also:

Fish v. *East* (C. C. A. 10), 114 F. 2d 177;
Beeler v. *Schumacher* (C. C. A. 6), 80 F. 2d 715.

The orderly administration of a bankrupt's estate requires that bankruptcy courts have exclusive jurisdiction to marshal all assets of a bankrupt, and to determine the validity, amount and method of liquidation of liens upon the assets and claims against the estate. And the paramount and exclusive jurisdiction over such property, given to the bankruptcy courts, under authority of the Constitution, gives to such courts the sole power to ascertain the validity and amount of all liens, and to decree the method of their liquidation.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Whitney v. *Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 25 S. Ct. 778;
Gamble v. *Daniel* (C. C. A. 8), 39 F. 2d 447, Certiorari denied 282 U. S. 848, 75 L. Ed. 752;
In re Schermerhorn (C. C. A. 8), 145 F. 341.

In *Isaacs* v. *Hobbs Tie & Timber Co., supra*, this Court stated the rule, at page 738 of U. S. Reports, as follows:

> "Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation."

The action in the State court being one *in personam*, and such court having no jurisdiction over any *res*, and the bankruptcy proceedings being in *rem* with exclusive jurisdiction over the property of bankrupt, the State court could not interfere with or affect such property. This is because any such interference with the essential powers of the bankruptcy court would thwart the fundamental purpose of due distribution among lienors and creditors contemplated by the Bankruptcy Act.

> *Isaacs* v. *Hobbs Tie & Timber Co., supra;*
> *Taylor* v. *Sternberg, supra.*

In this contention, petitioner is supported not only by the highest Federal authority, but by the highest State authority of the State in which the action was pending in the instant case, as well. In *Northeastern R. E. Sec. Corp.* v. *Goldstein*, 276 N. Y. 64, at page 69 (11 N. E. 2d 354, 356), the court said:

> "Where an action is commenced after adjudication which affects property actually or constructively in the possession of the trustee, the bankruptcy court has exclusive jurisdiction and a State court is without jurisdiction."

B. The statutory power of the State court under Section 475 of the Judiciary Laws of New York must yield to the exclusive jurisdiction of the bankruptcy court.

Bankruptcy courts having exclusive jurisdiction, as aforesaid, statutory powers granted to State courts, insofar as such powers may affect property subject to the exclusive jurisdiction of the bankruptcy courts, must give way to the superior jurisdiction of such bankruptcy courts. As this Court stated, in *Kalb* v. *Feuerstein*, 308 U. S. 433, 439, 84 L. Ed. 370, 374, 60 S. Ct. 343, 346:

> "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."

So, as in the instant case, the power granted to the State courts of New York by Section 475 of the Judiciary Laws, upon petition of the client or the attorney, to determine and enforce an attorney's lien, must yield to the exclusive jurisdiction vested in the bankruptcy courts by Congress under authority of the Constitution. The State of New York cannot, in the exercise of control over practice and litigation in its courts, vest such courts with power to violate the bankruptcy laws enacted under the supreme law of the land, the Constitution. And, in ruling as it did, the decision of the Circuit Court in the instant case is in conflict with the decision of this Court in *Kalb* v. *Feuerstein, supra.*

The authority to determine attorneys' liens under the New York laws is comparable to the power granted by

statute to State courts in receivership proceedings to make allowances to their officers, such as receivers and attorneys, in such proceedings. And it no longer is open to question but that upon the filing of a petition in bankruptcy, the State court is divested of such power, and its officers must be remitted to the bankruptcy court for such allowances.

This principle of law was enunciated by this Court in *Gross* v. *Irving Trust Co., supra,* and in *Taylor* v. *Sternberg, supra,* where this Court held that the statutory powers of State courts to make allowances to their officers in receivership cases pending in such courts were superseded by the exclusive jurisdiction over property of a bankrupt given to bankruptcy courts by Congress under authority of the Constitution. Compare also *McDaniel National Bank* v. *Bridwell, supra,* where the Circuit Court for the Eighth Circuit held that the inherent power of an equity court to prevent its own process from working injustice to anyone is superseded by bankruptcy proceedings.

And the Circuit Court for the Second Circuit itself, in *In re No. 32 East 67th Street,* 96 F. 2d 795, indicated that the matter of an attorney's lien under Section 475 of the Judiciary Law of New York is a matter to be determined by the bankruptcy court only, after adjudication; the Court, in that case, saying at page 796:

> "Whether they have a charging lien by virtue of section 475 of the New York Judiciary Act, Consol. Laws, c. 30, is a question which may be determined by the bankruptcy court if presented to it."

See also:

> *Chicago, R. I. & P. Ry. Co. of City* v. *Owatonna,* 120 F. 2d 226.

The Circuit Court, in the instant case, determined that the State court had jurisdiction to determine the attorneys' lien, as the continuation of the action involved a consent to such incidents as the exercise of that court's jurisdiction might involve, among them, that as a condition upon the substitution of new attorneys, the lien of the displaced attorneys must be liquidated. This decision was based upon the theory that the matter of substitution of attorneys was a matter of discretion with the court before whom the suit was pending, rather than a matter of absolute right. The court said, 119 F. 2d, at page 282:

> "He could not insist that new attorneys should represent him in that court without its consent, upon which it might impose such conditions as it saw fit."

It is submitted that under the law, such right of a State court is superseded by bankruptcy even though the matter of substitution is one of discretion with the State court. However, for the purpose of argument, let us assume that where a matter is discretionary, the State court may impose such conditions as it sees fit. Still, the Circuit Court in the instant case could not justify its decision on such a proposition of law, for in holding as it did, as above quoted, the Court went astray. It proceeded upon a false and unfounded theory, as the courts of New York have definitely established the principle that a litigant may discharge his attorney at any time, with or without cause, and, upon his application, the court must substitute the new attorneys of litigant's own selection. See Point II. of Argument, *supra*, and cases cited thereunder. This is not only the law as established by the courts of New York, but also as established by this Court. *In re Paschal, supra.*

C. A bankruptcy court will protect its exclusive jurisdiction by injunction.

Where a bankruptcy court has exclusive jurisdiction over property, as aforesaid, it will protect this jurisdiction by injunction.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Ex Parte Baldwin, 291 U. S. 610, 78 L. Ed. 1020, 54 S. Ct. 551;
Continental Ill. N. B. & T. Co. v. *C. R. I. & P. R. Co.,* 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595.

And where, as in the instant case, the property in the actual or constructive possession of the bankruptcy court is outside of the territorial limits in which such court has jurisdiction, the proper procedure is for the trustee to institute ancillary proceedings in the district where the property lies, and to obtain the necessary injunctive relief in such ancillary proceedings.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Ex Parte Baldwin, supra.

So, in the instant case, ancillary proceedings were instituted in New York, where the judgment was rendered, and where judgment debtors and respondents were located, and injunctive relief was obtained in the District Court for the Southern District of New York.

D. The consent of a bankruptcy court that another court may determine questions affecting property under its jurisdiction must be clear and affirmative, and its jurisdiction may not be affected by unauthorized action of its officers.

In this connection, we start with the proposition that a trustee, as in the instant case, may permit a bankrupt to prosecute a suit on a cause of action which is property of bankrupt's estate, and upon the successful termination of such suit the trustee may take the fruits of the litigation for the benefit of the estate.

Johnson v. *Collier*, 222 U. S. 538, 540, 56 L. Ed. 306, 32 S. Ct. 104;
In re Prudence Co., Inc. (C. C. A. 2), 96 F. 2d 157, 36 Am. B. R. (N. S.) 525;
Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 11, Page 1177.

By so doing, the trustee does not submit himself or the estate in bankruptcy to the jurisdiction of the court wherein the plenary action is pending.

In re Prudence Co., Inc., supra;
Kessler v. *Herklotz*, 117 N. Y. Supp. 45, 132 App. Div. 278, 22 Am. B. R. 257.

So, in the instant case, it is respectfully submitted that the trustee did not submit himself or the estate to the jurisdiction of the State courts of New York, so that such courts could determine liens against or claims to the proceeds of the suit. The Circuit Court was therefore in error herein in holding that the trustee could not avoid submitting himself to the jurisdiction of the court where

the action was pending "by hiding behind the formal plaintiff," and that "we deal with the case as though he had been openly the party plaintiff." This question, however, is one of importance in bankruptcy matters, and should be settled definitely by this Court.

Indeed, the general rule is that a bankruptcy court itself may not surrender its jurisdiction over the administration of an estate to another court.

> *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055, 32 S. Ct. 620;
> *Gross* v. *Irving Trust Co., supra*;
> *Isaacs* v. *Hobbs Tie & Timber Co., supra.*

However, to this general rule, there is an exception to the effect that a bankruptcy court may, in its discretion, permit a State court to try a certain issue when such bankruptcy court feels that the State court is in a better position to determine the same expeditiously. This was indicated by this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, in the general statement that other courts could not deal with property of a bankrupt or liens upon same "save by consent of the bankruptcy court." And again, in *Ex Parte Baldwin, supra*, Mr. Justice Brandeis, speaking for this Court, said:

> "Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the State court."

This authority to a bankruptcy court to permit another court to try such issues, being an exception to the general rule, it is submitted that the consent by the bankruptcy court that some other court try questions of title to or liens against property in its possession, must be affirmative and clear, and such consent should not be inferred

by implication from its consent that some other issue be so tried.

This was indicated by the Circuit Court of Appeals for the Second Circuit in *In re Weston*, 68 F. 2d 913, where the Court held that it would be necessary for the trustee to bring suit in a State court to determine the amount of a debt due to bankrupt, but that a mechanic's lien against such fund could only be adjudicated by the bankruptcy court. The Court said, at page 916:

> "The plenary suit necessary to ascertain the amount of the fund to be paid by the state must be brought by the trustee in the proper state court. Here the mechanic's lien is asserted against a fund to be paid by the State for a public improvement. There is no specific *res* but the lienor becomes by virtue of the statute the assignee of the debt to the contractor to the extent of his claim. *Arrow Iron Works* v. *Greene*, 260 N. Y. 330, 183 N. E. 515. Jurisdiction to determine the validity of that lien is vested in the bankruptcy court. The court below had authority and it was its duty to grant an injunction. *In re Everick Corp.*, 39 F. (2d) 765 (C. C. A. 2)."

Compare also *McDaniel Nat. Bank* v. *Bridwell*, *supra*, where the Circuit Court of Appeals for the Eighth Circuit held that a suit by a trustee, to recover money alleged to be that of bankrupt, in an equity court gave that court no jurisdiction other than to determine the issues in the case; that a final determination of the title to the deposit in question rather obviously ended the case so far as the jurisdiction of the court of equity was concerned; and that thereafter jurisdiction to determine controversies with respect to this asset of the bankrupt's estate was vested in the court of bankruptcy just as completely as if the title to the deposit had been in the bank-

rupt at the time his petition was filed. As the court said, page 430:

> "The only reason the trustee had resorted to the court as a court of equity was that the court of bankruptcy was without jurisdiction to adjudicate in a summary proceeding a controversy with reference to property held adversely to the bankrupt estate unless the consent of the adverse claimant was obtained."

So, in the instant case, the bankruptcy court had no jurisdiction to adjudicate the claim for breach of contract against Murray & Flood. For reasons of their own, the court and the trustee decided that the trustee should not intervene in and be substituted for the bankrupt-plaintiff in the suit pending in the State courts of New York. The bankruptcy court consented, therefore, that the trustee permit the suit to be continued in the name of the bankrupt with the understanding that the avails of same inure to the benefit of bankrupt's estate. Surely, this is far from a consent that the State court could or should determine claims to or liens against the proceeds of such suit.

It is imperative, therefore, in the interest of orderly administration of estates in bankruptcy, that this Court settle, once and for all, that a consent by a bankruptcy court that plenary action be taken to recover funds owing to a bankrupt may not be warped into a consent that the court in which such action is instituted also try and determine claims to or liens against the proceeds of such suit.

Nor can any action of the trustee herein be considered to have conferred such jurisdiction on the State court. The jurisdiction of the bankruptcy court cannot be af-

fected by officers of the bankruptcy court, either by waiver, estoppel or laches.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Whitney v. *Wenman, supra;*
In re Schermerhorn, supra.

Nor can there be any factual basis for any claim of such waiver or estoppel in the instant case. The trustee at no time conceded that the State court might determine the attorney's lien. In fact, counsel for the trustee stated to Mr. Justice Eder, Trial Judge of the cause in the Supreme Court for New York County, at the time the settlement was arrived at: "I wish to state on behalf of the trustee that the trustee does not recognize the validity of that lien and will take the proper steps to vacate same." The words of the court, in *Chicago, R. I. & P. Ry. Co.* v. *City of Owatonna, supra,* in a similar situation, are particularly applicable to the instant case. The court said, at page 227:

> "The contentions as to estoppel and as to laches may be shortly disposed of since there is no factual basis for either. Aside from this fact situation, there is no power in the officers of a bankruptcy court to affect this exclusive jurisdiction of that court whether by waiver, estoppel or laches."

E. A void order is subject to collateral attack which may be by injunction to restrain prosecution of void order.

The Supreme Court for New York County had no jurisdiction to determine the attorneys' lien of respondents. Its order awarding respondents a lien of 30% of any recovery was therefore a nullity. The acts of a

court without jurisdiction are void and subject to collateral attack.

Kalb v. *Feuerstein, supra;*
Grover and Baker Sewing Machine Co. v. *Radcliffe*, 137 U. S. 287, 34 L. Ed. 670, 11 S. Ct. 92;
Taylor v. *Sternberg, supra;*
31 Am. Jur., Judgments, Sec. 597.

Such collateral attack may be by injunction to restrain the enforcement of the void order.

31 Am. Jur., Judgments, Sec. 622, 623;
Freeland v. *Williams*, 131 U. S. 405, 33 L. Ed. 193, 9 S. Ct. 763;
Atchison, T. & S. F. R. Co. v. *Wells*, 265 U. S. 101, 68 L. Ed. 928, 44 S. Ct. 469.

And the bankruptcy court is a court of equity with power to issue injunctions to protect its jurisdiction from void orders of other courts.

Continental Ill. N. B. & T. Co. v. *C. R. I. P. R. Co., supra;*
Bankruptcy Act, Sec. 2 (15) (11 U. S. C. A., Sec. 11);
Judicial Code, Sec. 262 (28 U. S. C. A., Sec. 377).

Conclusion.

In conclusion, it is well to reiterate that the purpose of Article 1, Section 8, Clause 4, of the Constitution, and also of the Acts of Congress relating to bankruptcy enacted under authority of the Constitution, is to place the property of a bankrupt wherever found under the con-

trol of a single court for equal distribution among the bankrupt's creditors. *Straton* v. *New*, 283 U. S. 318, 320, 75 L. Ed. 1060, 51 S. Ct. 465; *Forrey* v. *Silberblatt* (C. C. A. 3), 78 F. 2d 1016. This necessarily includes the power and jurisdiction in such court over all cases and controversies between the bankrupt and his creditors for the collection of assets, the ascertainment of the validity and amount of liens thereon, and the determination of the method of their liquidation. *Isaacs* v. *Hobbs Tie & Timber Co., supra.*

The necessity for such provisions is admirably demonstrated in the instant case, where the Supreme Court of New York, undertaking to distribute assets of the bankruptcy court, without notice to or hearing the trustee or his attorney, awarded respondents a lien of 30 per cent of any recovery in the pending suit. In so doing, it made an award unquestionably erroneous under the decisions of the highest authority of that State. The Court of Appeals has time and time again reiterated that where a client discharges his attorney, no matter how arbitrary his reason be, such attorney may only recover for his services to the time of his discharge upon the basis of *quantum meruit. Martucci et al.* v. *Brooklyn Children's Aid Society et al.*, 284 N. Y. 408, 31 N. E. 2d 506; *Matter of Tillman, supra; Matter of Krooks, supra; Greenberg* v. *Remick & Co., supra; Martin* v. *Camp, supra; Matter of City of New York, supra.* In *Martucci et al.* v. *Brooklyn Children's Aid Society et al.*, the Court of Appeals, reversing a percentage award made by the lower courts, said:

> "The appellants moved for a substitution of attorneys and asked that the value of respondent's services be determined, * * * An order is before us which fixed respondent's lien at twelve and one-half per cent of any recovery secured or settlement made, but in no case less than $400.

> "Appellants urge that respondent's lien cannot be fixed on a percentage basis. Respondent is entitled to compensation on the basis of *quantum meruit*. A percentage allowance does not fall within the description of *quantum meruit*. The amount of recovery or settlement will depend on factors with some of which respondent has no concern. * * *."

In the instant case, respondents only object to submitting their claim to the bankruptcy court for determination. This objection is not sound. The bankruptcy court which has the duty of liquidating a lien against assets in an estate under its control, must have the power to determine the amount of the liability. It is not obliged to submit that question to another court. *Gross* v. *Bush Terminal Company* (C. C. A. 2), 105 F. 2d 930, 932; *Butzel* v. *Webster Apartments Co.* (C. C. A. 6), 112 F. 2d 362, 366.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the law may be properly and authoritatively defined, that the errors herein pointed out may be corrected, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit should be reversed in order that justice may be done to petitioner; and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Second Circuit and finally reverse it.

Respectfully submitted,

SYDNEY C. PERELL,
Attorney for Joseph K. Sherman, Trustee, Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 515

IN THE MATTER

of

LYTTLETON B. P. GOULD, Bankrupt, JOSEPH K. SHERMAN, TRUSTEE IN BANKRUPTCY of LYTTLETON B. P. GOULD, Bankrupt,

Petitioner,

against

BUCKLEY & BUCKLEY, WILLIAM E. BUCKLEY and DAVID A. BUCKLEY, JR.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

BUCKLEY & BUCKLEY,
Respondents *pro se.*

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RUSSELL C. GAY,
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SUBJECT INDEX.

	PAGE
OPINIONS OF THE COURTS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2, 3
STATEMENT OF THE CASE	3-6
ARGUMENT	6-21
I.—There is no conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. (2d) 428	7-9
II.—The Circuit Court of Appeals for the Second Circuit in the instant case has not decided a question of local law in conflict with New York decisions	9-11
III.—The New York Supreme Court had jurisdiction to fix the amount of the attorney's lien of Buckley & Buckley and is the proper court to enforce that lien	11-20
A—The New York Supreme Court had jurisdiction to fix the attorney's lien of Buckley & Buckley	12-15
B—The New York Supreme Court is the proper court to enforce the lien	15-18
C—The Decisions of the Supreme Court in *Isaacs* v. *Hobbs Tie & Lumber Co.*, *Taylor* v. *Sternberg* and *Gross* v. *Irving Trust Co.*, are not in conflict with the Decision of the Circuit Court of Appeals in the instant case	18-20
IV.—This case does not present a novel question	20-21
CONCLUSION	22
APPENDIX	23

Table of Cases.

	PAGE
In re Adamo, 151 Fed. 716	21
In re American Fidelity Corp., Ltd., 28 F. Supp. 462	11, 15, 17
Arkansas Corporation Commission v. *Thompson*, ... U. S. ....., 85 L. Ed. 801	18
In re Baxter & Co., 154 Fed. 22	13, 16
Bernstein v. *Bedrick*, 262 N. Y. 472, 188 N. E. 25	10, 16
Brown Shoe Co. v. *Wynne*, 281 Fed. 807	9
Connell v. *Walker*, 291 U. S. 1	12, 17
Corner v. *The John Hancock Life Ins. Co.*, 80 F. (2d) 413	15
Davis v. *Wakelee*, 156 U. S. 680	16
In re Devereaux, 76 F. (2d) 522	15
Eyster v. *Gaff*, 91 U. S. 521	12
Fischer v. *Pauline Oil & Gas Co.*, 309 U. S. 294	17
Gross v. *Irving Trust Company*, 289 U. S. 342	19
Hartman v. *Swiger*, 215 Fed. 986	16
Hausvater v. *Wikler & Diamont, Inc.*, 154 Misc. 555, 277 N. Y. Supp. 810	11
Hobbs v. *Head and Dowst Co.*, 231 U. S. 692	11, 17
Hofman v. *New York & Queens Electric Light & Power Co.*, 247 App. Div. 819, 286 N. Y. Supp. 685, modified 247 App. Div. 890, 288 N. Y. Supp. 768	10
Hunt v. *New York Cotton Exchange*, 205 U. S. 322	13
Isaacs v. *Hobbs Tie & Lumber Co.*, 282 U. S. 734	18
Kane v. *Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111, aff'd 177 N. Y. 557, 69 N. E. 1125	10, 14
Lawbaugh v. *Sweeney*, 237 App. Div. 788, 262 N. Y. Supp. 830, appeal dismissed 262 N. Y. 528, 188 N. E. 50	10

PAGE

Matter of Tillman, 259 N. Y. 133, 181 N. E. 75 11
McDaniel National Bank v. *Bridwell*, 65 F. (2d) 428 7, 8
McHenry v. *La Societe Francaise*, 95 U. S. 58 15
McNally v. *Youngs*, 237 App. Div. 787, 262 N. Y. Supp. 828, appeal dismissed 262 N. Y. 526, 188 N. E. 49 10
Metcalf v. *Barker*, 187 U. S. 165 13
Oishei v. *Pennsylvania R. R. Co.*, 117 App. Div. 110 .. 16
Palmer v. *Texas*, 212 U. S. 118 13
Peck v. *Jenness*, 7 How. 612 13
In re Pennell, 159 Fed. 500 16
Pickens v. *Roy*, 187 U. S. 177 13
In re Prudence Co., Inc., 96 F. (2d) 157, cert. den. 305 U. S. 616 16
Taylor v. *Sternberg*, 293 U. S. 470 19
Thatcher v. *Rockwell*, 105 U. S. 467 12
Yuengling v. *Betz*, 58 App. Div. 8, 68 N. Y. Supp. 574 10

STATUTES CITED.

Judiciary Law of New York, Section 475 ..... 8, 13
Civil Practice Act of New York, Sections 83 and 193(3) 14

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against

BUCKLEY & BUCKLEY, WILLIAM E. BUCKLEY and DAVID A. BUCKLEY, JR.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions of the Courts Below.

The opinion of the District Court of the United States for the Southern District of New York is not officially reported. It was written by District Judge John W. Clancy and filed December 6, 1940. The opinion is set forth in full on page 71 of the record.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 119 F. (2d) 280. The opinion was written by Judge Learned Hand and

filed on April 8, 1941. A copy of the opinion is annexed to the certified transcript of the record and numbered pages 74 to 77.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered May 23, 1941.

The petition for Writ of Certiorari was filed August 15, 1941. The jurisdiction of this Court is invoked under provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347).

Questions Presented.

In 1934, the Trustee in Bankruptcy secured the consent of the Bankruptcy Court—the Referee—that an action which had been commenced in the Supreme Court of the State of New York prior to the Bankruptcy of the plaintiff in the action, Lyttleton B. P. Gould, should be continued in the State Court by the trustee but in the name of the Bankrupt Plaintiff (Fol. 27). Shortly thereafter the Trustee in Bankruptcy insisted and directed that a motion for the substitution of attorneys for the Plaintiff Bankrupt be brought in the State Court (Fols. 45-47). The State Court granted said motion for substitution of attorneys and fixed the lien of the attorney respondents herein in its Order of Substitution (Fols. 58-63). Pursuant to this Order, all papers and records were delivered by the respondents herein. No appeal was ever taken from said Order of the State Court which was entered February 25, 1935, and the time to appeal has expired.

In 1940, the present proceeding was started when the Trustee in Bankruptcy sought injunctive relief in the Federal District Court in its exercise of ancillary jurisdiction in bankruptcy against the enforcement of your Respondents' lien in the State Court (Fols. 15-33). The case presents the following questions:

1. Whether the Federal District Court in the exercise of ancillary jurisdiction in bankruptcy may enjoin the enforcement of an Order of the State Court which fixed an attorney's lien in an action where the Trustee in Bankruptcy with the consent of the Referee in Bankruptcy has availed himself of the jurisdiction of that State Court in said action?

2. Whether the Order of the Supreme Court of the State of New York from which no appeal was ever taken is not the law of the case?

3. Whether the Trustee, having directed a motion in the New York Supreme Court for a substitution of attorneys and having accepted the benefits of the Order of Substitution and having taken no appeal from said Order within the statutory time allowed, is not now barred on grounds of estoppel, equity and *res adjudicata* from any collateral attack in the Federal Court upon said Order of Substitution?

Statement of the Case.

The petition in this case is for a Writ of Certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit (R. 74-77), reversing an Order in Bankruptcy entered by the United States District Court for the

Southern District of New York which enjoined David A. Buckley, Jr., and William E. Buckley from taking any steps in an action in the Supreme Court of the State of New York to enforce the charging lien granted by an Order of the State Court.

On May 13, 1941, the Trustee in Bankruptcy applied to the Circuit Court of Appeals for the Second Circuit for a stay of mandate pending the determination of its petition for a Writ of Certiorari. After oral argument and presentation of briefs, the stay was denied.

The cause was remanded to the District Court for entry of an Order denying an injunction. The Mandate was entered on May 23, 1941 (R. 77).

On or about June 4, 1941, the Trustee in Bankruptcy applied to Mr. Justice Stone for a stay of mandate pending the determination of his petition to the Supreme Court of the United States for a Writ of Certiorari. The stay was granted on June 5, 1941.

In 1927, Gould retained Buckley & Buckley, the respondents herein, as his attorneys to sue Murray and Flood in the Supreme Court of the State of New York under an agreement which provided that Buckley & Buckley should act as Counsel for a contingent fee of fifty per cent of the net recovery. Gould at that time was not a bankrupt (Fols. 28, 29, 70, 71).

In 1932, the case came to trial and the plaintiff was nonsuited and appealed (Fol. 29).

The appeal was pending at the time Gould was adjudicated a bankrupt in 1934 by the United States District Court for the District of Connecticut, and Joseph K. Sherman was appointed his Trustee (Fol. 26).

Sherman, the Trustee, agreed and secured the consent of the Bankruptcy Court that the action should be continued in the name of Gould, the Bankrupt (Fol. 27).

In 1934, the Trustee, through his attorney, sought a substitution of attorneys for the Plaintiff Bankrupt and conferred with your Respondents on the matter. Pursuant to this policy Davies, Auerbach & Cornell, the proposed new Counsel, wrote to your Respondents suggesting a stipulation providing for the substitution and the preservation and determination of your Respondents' lien (Fols. 50, 51).

In January, 1935, Davies, Auerbach & Cornell moved in the State Court for their substitution in the place of your Respondents and such a motion was made under the oral and written instructions of the attorney for the Trustee in Bankruptcy (Fols. 45-47).

The State Court entered an Order on February 25, 1935, substituting attorneys and fixing the lien of your Respondents at thirty per cent of any recovery, together with disbursements which should be determined on a reference (Fols. 58-63).

Relying on this Order, your Respondents delivered all papers in their possession, covering more than eight years' work, and the new attorneys prosecuted the appeal and secured a reversal. The Order granting the substitution of attorneys and fixing the attorneys' lien was granted by the Judge before whom the case was tried, the trial of which lasted seven weeks.

Neither the Bankrupt nor the Trustee in Bankruptcy appealed from the Order of the State Court fixing your Respondents' lien (Fols. 208-209) and their time to appeal has expired. Instead the Bankrupt and the Trustee accepted the benefits of said Order, and Davies, Auerbach & Cornell became at that time and have since remained the attorneys of record in said action (Fol. 61).

The action of the State Court came up for a second trial in October, 1940, and the defendants offered to settle for $40,000, which offer was accepted by the Trustee (Fols. 202-210).

Upon the settlement, your Respondents moved in the action in the State Court for an Order directing the defendants to pay to them thirty per cent of the amount agreed upon, together with their expenses (Fols. 141-165).

The Trustee on Oct. 23, 1940 moved in the State Court to vacate the State Court Order of Feb. 25, 1935. This motion was denied May 7, 1941.

The Trustee also on Oct. 23, 1940 applied to the Bankruptcy Court for an Order enjoining your Respondents from prosecuting this motion (Fols. 15-33).

The District Court held that the State Court had no jurisdiction to liquidate the lien and that its Order was a "nullity" and enjoined the Respondents from proceeding in the State Court (Fols. 211-213). On December 20, 1940, an Order was entered in the United States District Court for the Southern District of New York enjoining and restraining Respondents from taking any further proceedings to collect upon their attorneys' lien in the State Courts (Fols. 10 to 14).

Your Respondents appealed from this Order of the District Court and the Circuit Court of Appeals for the Second Circuit reversed the Order of the District Court and denied the motion for an injunction (R. 74-77).

The Opinion of the Circuit Court is reported in 119 F. (2d) 280.

ARGUMENT.

The decision of the Circuit Court of Appeals in the instant case is not in conflict with any decision of any other Circuit Court of Appeals or of any Court of the State of New York or of the Supreme Court of the United States.

The New York Supreme Court had jurisdiction to determine the attorneys' lien and is the proper Court to enforce it. The Trustee in the performance of his duties elected to continue the action in the State Court and utilized the procedure thereof to obtain a substitution of attorneys for the formal plaintiff and, by so doing, the Trustee subjected himself to the jurisdiction of the State Court for the determination of the lien of Buckley & Buckley. Having taken no appeal from the Order fixing the lien, the Order is now a final determination and cannot be attacked collaterally.

The decision of the Court below is correct and presents no question of law calling for review by this Court.

I.

There is no conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. (2d) 428.

The petitioner has set forth an incomplete statement of the *McDaniel* case in his brief at pages 20 to 22. He has failed to point out that the plenary suit brought by the Trustee in an Equity Court, to which the bank was a party, to determine the ownership of a bank deposit was finally determined by that Court; that the bank asserted no claim to the deposit; and that no appeal was ever taken by any party. It was subsequent to such final determination that the Bank filed a new Bill in Equity requesting the payment of a promissory note out of the deposit which was the subject of the prior suit.

In the *McDaniel* case the trustee originally sought the jurisdiction of the Equity Court, but the Bank did not then take advantage of the presence of the trustee in the Equity Court, but permitted a final determination of that action. Thereafter, when the trustee was no longer subject to the jurisdiction and the power of the Equity Court, the Bank sought by a separate suit to recover on a promissory note of the Bankrupt. At page 429 the Court said:

> "The subject-matter of the suit of the trustee was the ownership of the deposit. The claim which the bank now seeks to offset is upon the note of the bankrupt. This note did not arise out of the same transaction as the deposit. The bank elected not to assert its right of set-off against the trustee in the original suit. It permitted that suit to be finally determined."

It is of interest to note that, as an incident to the original suit in determining the amount to be turned over to the Trustee, the Equity Court instructed that an attorney's fee be allowed Counsel for the Bank and that such attorney's fee and costs should be deducted from the amount to be paid over to the Trustee.

In the instant case the attorney's lien attached to the cause of action as soon as the action was commenced (See New York Judiciary Law, Sec. 475, which is set forth in Appendix, p. 23). In the substitution of attorneys after bankruptcy it was proper for the court to fix the lien of the substituted attorneys. The substitution was an outgrowth of the prosecution of the cause of action by the trustee in the name of the formal plaintiff. The enforcement of the lien is, therefore, not independent of the cause of action which the bankrupt with the consent and approval of the referee and of the Trustee in Bankruptcy prosecuted in the New York Supreme Court.

Rather than there being a conflict of decisions in the several Circuits, a study of the reports discloses that the decision in the instant case by the Circuit Court of Appeals is in accord with analogous decisions elsewhere. For example, in the Fifth Circuit, in the case of *Brown Shoe Co.* v. *Wynne,* 281 Fed. 807, it has been held that a judgment of a state court, subjecting to a lien property over which it acquired jurisdiction prior to bankruptcy proceedings against the defendants is conclusive on them and their trustee in bankruptcy, and not subject to review or annulment by the bankruptcy court.

II.

The Circuit Court of Appeals for the Second Circuit in the instant case has not decided a question of local law in conflict with New York decisions.

Petitioner at page 9 of his petition states that the Circuit Court decided that "new attorneys could not be substituted in the State court action without the consent of that court . . .". This reference by the petitioner to the opinion of the Circuit Court of Appeals lifts out a single sentence of the opinion and does not represent the exact thought of the court. The relevant portions of the opinion of the Circuit Court of Appeals on this matter of substitution are as follows:

> ". . . He could of course substitute other attorneys, as he did, and Buckley & Buckley were obliged to retire; but the substitution did not affect their charging lien under § 475 of the Judiciary Law of New York, or their possessory lien upon the papers. The concluding clause of § 475 gives power to the state court to 'determine and enforce the lien,'

> which the 56th Rule of the Supreme Court has declared must be 'on such terms as shall be just.'
>
> ". . . He could not insist that new attorneys should represent him in that court without its consent, upon which it might impose such conditions as it saw fit. . . . As we have said, the trustee got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a consent to such incidents as the exercise of that court's jurisdiction might involve, among them that, as a condition upon the substitution of new attorneys, the charging lien of the displaced attorneys must be liquidated."

In the first place, the Circuit Court has correctly stated the New York rule. It is well settled in New York that the courts have power to make an order of substitution upon the condition that the plaintiff shall pay the amount then due to the attorney of record, and to send the matter to a referee to determine the amount then due.

Kane v. *Rose,* 87 App. Div. 101, 84 N. Y. Supp. 111, aff'd 177 N. Y. 557, 69 N. E. 1125;

Yuengling v. *Betz,* 58 App. Div. 8, 68 N. Y. Supp. 574;

Bernstein v. *Bedrick,* 262 N. Y. 472, 188 N. E. 25;

Hofman v. *New York & Queens Electric Light & Power Co.,* 247 App. Div. 819, 286 N. Y. Supp. 685, modified 247 App. Div. 890, 288 N. Y. Supp. 768;

McNally v. *Youngs,* 237 App. Div. 787, 262 N. Y. Supp. 828, appeal dismissed 262 N. Y. 526, 188 N. E. 49;

Lawbaugh v. *Sweeney,* 237 App. Div. 788, 262 N. Y. Supp. 830 appeal dismissed 262 N. Y. 528, 188 N. E. 50;

Hausvater v. *Wikler & Diamont, Inc.*, 154 Misc. 555, 277 N. Y. Supp. 810;
Matter of Tillman, 259 N. Y. 133, 181 N. E. 75.

Moreover, on February 25, 1935, Mr. Justice Edward J. McGoldrick entered an order substituting the firm of Davies, Auerbach & Cornell for the firm of Buckley & Buckley as attorneys for the Bankrupt and further ordered that the firm of Buckley & Buckley be awarded a lien of 30% upon any moneys recovered (Fols. 58-63). If petitioner wished to contest the order as being contrary to the New York rule, then he should have caused an appeal to be taken through the proper channels.

The Trustee did move to vacate the Order of the New York Supreme Court fixing the lien on October 23, 1940 (Fols. 118 to 140). The time to appeal from such Order had long since lapsed. The Trustee's motion was denied by the New York Supreme Court. The Order stands therefore as the Law of the Case.

Hobbs vs. *Head and Dawst Co.* 231 U. S. 692;
In re American Fidelity Corp., Ltd. 28 F. Supp. 462.

III.

The New York Supreme Court had jurisdiction to fix the amount of the attorneys' lien of Buckley & Buckley and is the proper court to enforce that lien.

Petitioner's "Reasons" for granting the writ numbered III, IV and V, are dealt with under this point and are grouped together because it is felt that the repetition and generalities of principles of law, set forth in the petition,

do not clearly and specifically deal with the factual situation in the instant case, such as the failure of the Trustee to act under the procedure available to him when first appointed, his subsequent consent to the jurisdiction of the State Court, and his acquiescence in and acknowledgment of the receipt of benefits from the Order of the State Court, all of which is now ignored by the Trustee.

The instant case does not involve a novel question of law for decision by the Supreme Court of the United States, but is based upon existing facts which have been determined by the Circuit Court of Appeals for the Second Circuit and in accordance with sound precedents after oral argument by the present counsel for the petitioner and the respondent.

It would appear that the "Reasons" numbered III, IV and V of the petition depend upon these questions: (1) Did the New York Supreme Court have jurisdiction to fix the lien; (2) Is it the proper court to enforce that lien? The decisions of the Supreme Court of the United States, and other courts, are clear in showing that the above questions should be answered in the affirmative.

A. The New York Supreme Court had jurisdiction to fix the attorneys' lien of Buckley & Buckley.

An action pending in a state court will not abate because of the bankruptcy of the plaintiff and the State Court continues to have jurisdiction.

Eyster vs. *Gaff*, 91 U. S. 521;
Thatcher vs. *Rockwell*, 105 U. S. 467;
Connell vs. *Walker*, 291 U. S. 1.

That a Court having jurisdiction of a cause of action and the parties thereto has the power and authority to conduct, adjudicate and control every incident thereto is

well settled. The procedure and orders affecting the rights of litigants and officers of the Court to an action are all incidents of which the Court first acquiring jurisdiction should control. One of the best quotations authoritative of this statement is found in the case of *Peck* v. *Jenness*, 7 How. 612, wherein the Court said at pages 624 and 625:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity."

These principles of *Peck* v. *Jenness, supra*, have been followed:

Metcalf v. *Barker*, 187 U. S. 165;
Pickens v. *Roy*, 187 U. S. 177;
Hunt v. *New York Cotton Exchange*, 205 U. S. 322, 339;
Palmer v. *Texas*, 212 U. S. 118, 129.

From the commencement of the action in 1927 by Gould against Murray and Flood, a lien attached to the avails thereof for the firm of Buckley & Buckley (New York Judiciary Law, Section 475, *supra*, p. 23). This lien was an incident of the main cause of action and was dependent upon it. This lien was a substantive right and could not be prejudiced by the substitution of attorneys.

In Re Baxter & Co., 154 Fed. 22, 25.

When the Trustee directed the motion in the State Court to substitute attorneys, he thereby initiated the procedure in the state court of which the fixing of the lien was a part. He took advantage of Sec. 83 of the New York Civil Practice Act (Appendix, p. 23) by reason of which the action by Gould, the Bankrupt, against Murray and Flood could be continued in the name of the original party, Gould, after the bankruptcy. He could have intervened and appealed, being the real party in interest, but failed to do so. Sec. 193, sub. 3 of the New York Civil Practice Act (Appendix, p. 23). In his opinion below, Judge Learned Hand said:

> "* * * When he determined to do that, he necessarily subjected himself to the procedure of the state court, of which the substitution of attorneys was a part. He could not insist that new attorneys should represent him in that court without its consent, upon which it might impose such conditions as it saw fit. In spite of the fact that the jurisdiction of the bankruptcy court is usually described as 'exclusive', it may consent to have the interests of third persons in property of which the bankrupt had possession, adjudicated in a state court if that is more convenient. Foust *v.* Munson S. S. Lines, 299 U. S. 77; Texas *v.* Donoghue, 302 U. S. 284; Thompson *v.* Magnolia Petroleum Co., 309 U. S. 478, 483; In Re Schulte United, Inc., 49 Fed. (2) 264 (C. C. A. 3). As we have said, the trustee got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a (fol. 78) consent to such incidents as the exercise of that court's jurisdiction might involve, among them that, as a condition upon the substitution of new attorneys, the charging lien of the displaced attorneys must be liquidated" (R. pp. 76, 77).

In the case of *Kane* v. *Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111, aff'd 177 N. Y. 557, 69 N. E. 1125, the Appellate Division said at page 103:

"* * * The plaintiffs accepted the order of substitution containing the provision for the reference, and that order not having been appealed from must be binding upon the parties in all of its terms and conditions. Section 66 of the Code of Civil Procedure provides that the 'court upon the petition of the client or attorney may determine and enforce the lien,' and the plaintiffs having invoked the equitable powers of the court in making a change of attorneys (Greenfield *v.* Mayor, 28 Hun, 320, 321) they must be deemed to have submitted to the jurisdiction (Yuengling *v.* Betz, 58 App. Div. 8, 10) and they are bound to submit to any lawful order of the court."

Petitioner has made frequent references to the so-called exclusive jurisdiction of the bankruptcy court, but at page 50 of his brief has recognized that it is proper for a bankruptcy court to permit a State Court to try a certain issue when such bankruptcy court feels that the State Court is in a better position to determine the same expeditiously. That the jurisdiction of the bankruptcy court is not exclusive and that the State Court is the proper tribunal to settle certain matters has been recognized by this and other Federal Courts.

McHenry v. *La Societe Francaise*, 95 U. S. 58;
Corner v. *The John Hancock Life Ins. Co.*, (C. C. A. 8th) 80 F. (2d) 413;
In re Devereaux, 76 F. (2d) 522;
Matter of American Fidelity Corp., Ltd., (S. D. Cal.) 28 F. Supp. 462.

B—The New York Supreme Court is the proper court to enforce the lien.

The attorneys' lien of the firm of Buckley & Buckley is a statutory lien, came into being in 1927 with the filing of

the complaint and its status was not impaired by the bankruptcy of the plaintiff.

In re Prudence Co., Inc., 96 Fed. (2d) 157, certiorari denied 305 U. S. 616;
Hartman v. *Swiger*, 215 Fed. 986;
In Re Pennell, 159 Fed. 500;
In re Baxter, 154 Fed. 22;
Oishei v. *Pennsylvania R. R. Co.*, 117 App. Div. 110.

The New York Supreme Court had jurisdiction of the subject matter and the parties when it fixed the lien of 30% (See A, *supra*). Mr. Justice McGoldrick acted in accordance with the New York decisions when he awarded the firm of Buckley & Buckley a lien of 30% upon any moneys recovered through the action (*supra*, Point II).

Moreover, the Trustee, having accepted the benefit of the Order, should not now be permitted to question either the validity of the Order or its enforcement.

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Davis v. *Wakelee*, 156 U. S. 680, 689.

To refuse to enforce the order, would deprive the firm of Buckley & Buckley of a substantive right established by virtue of Section 475 of the Judiciary Law.

In re Baxter & Co., 154 Fed. 22.
Bernstein v. *Bedrick*, 262 N. Y. 472, 188 N. E. 25.

The State Court did not cause a conflict with nor impair the jurisdiction of the bankruptcy or the administration of the bankrupt estate, for by its order it made possible the decision of the Trustee to secure new counsel while retaining the benefit of eight years' work of former counsel. The State Court Order forced the surrender of valuable property and fixed the compensation. This compensation was known and acceptable to the Trustee since 1935 and was payable out of the proceeds of the action. This could not have interfered with but only aided the administration of the bankrupt estate. The State Court had before it the cause of action, the attorneys involved as its officers whom it could direct and discipline if necessary and whose services it knew, and therefore, it is submitted, is the Court best suited and with proper jurisdiction over all necessary parties to enforce the lien.

The Supreme Court of the United States has decided that if the Trustee intervenes in the State Court to contest a lien rather than have its validity decided by a summary proceeding in the Bankruptcy Court, the Trustee is bound by any decision handed down in the State Court.

> *Connell* v. *Walker*, 291 U. S. 1;
> *Fischer* v. *Pauline Oil & Gas Co.*, 309 U. S. 294;
> *Hobbs* v. *Head, etc., Co.*, 231 U. S. 692.

In the well considered opinion in the case of *In Re American Fidelity Corp., Ltd.*, (S. D. Cal. 1939) 28 F. Supp. 462, the court had to deal with a situation in which a trustee in bankruptcy had submitted to the jurisdiction of the state court to determine the validity of an execution lien. The state court upheld the validity thereof, and on the finality of that decision, the District Court, at page 471, held as follows:

> "In any event, a federal court has no power to interfere with a state court judgment, even though void on its face, unless the federal court otherwise has jurisdiction over the parties just as though there had been no bankruptcy proceedings. In such circumstances it is necessary that a complaint be filed in the nature of a bill to review the judgment upon the ground of fraud, accident, surprise, mistake, or the like. Le Messager v. Variel, *supra.* The proceeding now before this court is not of such nature. There having been no appeal and no properly grounded suit collaterally attacking the validity of the judgment of the state court, that judgment is now a final determination by a court of competent jurisdiction."

The Trustee is attempting to establish that he is entitled to an adjudication by two separate courts, one state and one federal, on the validity of the lien. He submitted to the state court in 1935, accepted its order without appeal and, now being dissatisfied with the order therein, asks the bankruptcy court to invalidate that order. Such a position was held untenable by this Court in the recent case of *Arkansas Corporation Commission* v. *Thompson,*————————U. S. ————————, 85 L. Ed. 801, decided April 28, 1941, wherein it was held that a determination of value for state taxing purposes made by a properly constituted Arkansas Commission, from which no appeal was taken by the Trustee in bankruptcy, was final and could not be upset by the bankruptcy court on petition of the Trustee.

C—The Decisions of the Supreme Court in *Isaacs* v. *Hobbs Tie & Lumber Co., Taylor* v. *Sternberg* and *Gross* v. *Irving Trust Co.,* Are Not in Conflict with the Decision of the Circuit Court of Appeals in the Instant case.

In *Isaacs* v. *Hobbs Tie & Lumber Co.,* 282 U. S. 734 there was a question of real estate. The title to the real estate

was in the Trustee in Bankruptcy. The proceeding to foreclose the mortgage was commenced after the petition in bankruptcy, and at a time when the proceedings in bankruptcy had progressed as far as an order authorizing the sale of the property in question. In our present case the Supreme Court of the State of New York had jurisdiction for more than seven years prior to Bankruptcy and retained its jurisdiction of the cause of action and proceeded with its conduct not in conflict with, but in assistance of the Bankruptcy Court in keeping with the Trustee's desires.

In *Taylor* v. *Sternberg,* 293 U. S. 470, there was a state's receivership and within one month there was an adjudication in bankruptcy. The state receiver, after the adjudication, turned over to the Trustee in Bankruptcy the property less his own compensation and the compensation of his attorney. In that case the property of the Bankrupt during the state receivership was in the possession of the state court in fact and upon bankruptcy the possession of the Bankruptcy Court attached. This ended the jurisdiction of the state court, under the well-settled principles of Bankruptcy Law. The state court's subsequent act in fixing the receiver's compensation was in conflict with the Bankruptcy Court and without jurisdiction. However, in the instant case, the jurisdiction of the state court continued.

A somewhat similar case was *Gross* v. *Irving Trust Company,* 289 U. S. 342, where again we have a state receivership and bankruptcy within four months and the state court fixing the compensation of the receivers and their counsel after bankruptcy. In that case the state receivership occurred on October 13, 1931, Federal bankruptcy on October 14, 1931 and on December 14, 1931 the state court made allowance to its receivers and their

counsel. Again there was no question of the fact that the jurisdiction of the state court terminated upon bankruptcy and there was a conflict with the Bankruptcy Court.

In all of these cases we find a situation in which no attorney's lien is discussed nor arises as an issue, nor is there a continuing jurisdiction in the state courts such as in our case. The rules of bankruptcy were created to safeguard and protect the bankrupt estate and thus the creditors of the Bankrupt. At the same time these rules were not created to destroy or wipe out the principles of comity, and legally existing substantive rights of attorneys under state laws. Bankruptcy did not wipe out the state law and the federal law in respect to an attorney's lien, which, because of its peculiar nature, is attached to and becomes part of the action in question and to which the Trustee in Bankruptcy was subordinated in that he could enjoy and take the proceeds of the action, subject only to the charging lien of the attorneys. It is not sufficient to merely offer in prayer the word "bankruptcy" and cite some cases involving it, which upon scrutiny and careful analysis have no application whatever to our present facts.

IV.

This case does not present a novel question.

The petitioner would present for consideration what is purported to be a novel question, a solution of which is essential to the orderly administration in bankruptcy courts. In submitting such a question and his suggestion to this Court that he presents a grave question of public policy which would require the attention and decision of this Court, petitioner fails to point out that there were sev-

eral methods of procedure available to the petitioner in 1935 in respect to the State Court action. He did not avail himself of the other methods of procedure under the Bankruptcy Act, but voluntarily elected the proceedings in the instant case. He requested assistance of the State Court and this assistance was rendered and given to him. His procedure was based on established law. Under these circumstances, it is difficult to consider as serious the petitioner's suggestion that we have novel questions of law involved in the instant case.

The relationship of an attorney's lien on an action in a state court to bankruptcy proceedings was passed upon in *In re Adamo,* 151 Fed. 716 (1907), wherein it was held that a trustee is not authorized to compromise and settle a suit brought by the Bankrupt in a state court without the consent of the Bankrupt's attorney in such suit who has a lien on any judgment recovered for his services.

This was a case in the Eastern District of New York which has never been reversed and was available to the petitioner for his consideration when he chose his path of procedure in 1935.

The position taken by the petitioner is contra to established practice for the orderly administration of bankrupt estates. If the Order herein questioned were invalidated, then there was no proper substitution of attorneys; the entire proceedings in the State Court would fall; the settlement of the action in the State Court was improper; the defendants in the State Court action are not protected; your respondents will be deprived of their property under the lien and all parties would ultimately be litigants with and against each other and with and against the Bankrupt's estate.

Conclusion.

The decision below is correct. No question of importance is involved and no conflict exists. We therefore respectfully submit that the petition should be denied.

Respectfully submitted,

BUCKLEY & BUCKLEY,
Respondents *pro se.*

Of Counsel:
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Appendix.

SECTION 475 OF THE JUDICIARY LAW OF NEW YORK:

"From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34, eff. Sept. 1, 1938."

SECTION 83 CIVIL PRACTICE ACT OF NEW YORK:

"In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party, unless the court directs the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party as the case requires."

SECTION 193 CIVIL PRACTICE ACT OF NEW YORK:

* * * * * *

"3. Where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."